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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

CAPITAL CASE

WILLIAM VAN POYCK,
Petitioner,

vs.

MICHAEL M. MOORE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW
-CAPITAL CASE-

The questions presented in this CAPITAL CASE are:

1. WHERE HIS JURY INDICATED ON ITS VERDICT FORM THAT SOME OF ITS MEMBERS BELIEVED VAN POYCK WAS THE TRIGGERMAN AND GUILTY OF PREMEDITATED MURDER, YET THE FLORIDA SUPREME COURT SUBSEQUENTLY ACQUITTED VAN POYCK OF PREMEDITATION AND OF BEING THE TRIGGERMAN (DUE TO INSUFFICIENT EVIDENCE), ARE THOSE GROUNDS INVALID AND IS VAN POYCK'S DEATH SENTENCE UNRELIABLE IN VIOLATION OF THE EIGHTH AMENDMENT?

2. WAS VAN POYCK DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT PENALTY PHASE WHEN HIS LAWYER FAILED TO CONDUCT A PRE-TRIAL INVESTIGATION AND FAILED TO INTRODUCE EVIDENCE SHOWING THAT VAN POYCK WAS NOT THE TRIGGERMAN, DUE TO A MISTAKEN BELIEF THAT THERE WOULD BE AN EXTENSION OF TIME BETWEEN THE GUILT AND PENALTY PHASES?

3. WAS VAN POYCK DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON HIS DIRECT APPEAL, UNDER THE TWO PART *STRICKLAND* STANDARD, WHEN HIS DRUG-ADDICTED, MENTALLY ILL ATTORNEY BOTCHED THE APPEAL OF A JUROR ISSUE BY NAMING THE WRONG TWO JURORS, THUS DOOMING AN OTHERWISE MERITORIOUS ARGUMENT?

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LIST REQUIRED BY RULE 14.1(b) AND 29.6

Pursuant to this Court's Rule 14.1(b), the party who sought to have his judgment and conviction reviewed by the United States Court of Appeals for the Eleventh Circuit is William Van Poyck. Pursuant to this Court's Rule 29.6, Petitioner certifies that he is an individual.

No. _____

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PETITION FOR WRIT OF CERTIORARI

Petitioner William Van Poyck, a state prisoner under sentence of death for a conviction of felony murder, respectfully moves this Honorable Court to issue a writ of *certiorari* to review the decision of the United States Court of Appeals for the Eleventh Circuit, rendered on May 9, 2002, affirming the district court's denial of Van Poyck's Petition for Writ of Habeas Corpus, with rehearing denied on June 21, 2002.

OPINIONS BELOW

The June 21, 2002 Order Denying Reconsideration and the May 9, 2002 decision of the United States Court of Appeals, Eleventh Circuit, appear in Petitioner's Appendix at A-2 and B-1 through B-20, respectively. The reported decisions of the Supreme Court of Florida, denying Van Poyck's state habeas petition, *Van Poyck v. Singletary*, 715 So.2d 930 (Fla. 1998), and denying his appeal for relief under Florida's Rule of Criminal Procedure 3.850, *Van Poyck v. State*, 694 So.2d 686 (Fla. 1997), appear in Petitioner's Appendix at C-1 through C-22 and D-1 through D-30, respectively. The decision of the Supreme Court of Florida, affirming Petitioner's conviction and sentence on direct appeal, *Van Poyck v. State*, 564 So.2d 1066 (Fla. 1990), appears in Petitioner's Appendix at E-1 through E-9. The state trial court's sentencing order appears in Petitioner's Appendix at F-1 through F-5.

STATEMENT OF THE BASIS FOR JURISDICTION

1. The decision of the United State Court of Appeals for the Eleventh Circuit sought to be reviewed was rendered on May 9, 2002; and Petitioner's timely Petition for Rehearing was denied on June 21, 2002.

2. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 2254(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition raises issues under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, as set forth in the Appendix at G-1 to G-2.

STATEMENT OF THE CASE

A. Basis for Federal Court Jurisdiction

Petitioner invoked the jurisdiction of the district court pursuant to 28 U.S.C. § 2254(a). The appellate court had jurisdiction under § 2254(a).

B. Underlying Facts and Proceedings Below

The evidence presented at Van Poyck's trial has been summarized by the Florida Supreme Court. *See Van Poyck v. State*, 564 So.2d 1066 (Fla. 1990). Briefly, the record reflects that on June 24, 1987, corrections officers Steven Turner and Fred Griffis transported James O'Brien, a prisoner at Glades Correctional Institution, to a dermatologist's office. After they pulled into a parking space behind the office, they were confronted by Van Poyck and his co-defendant, Frank Valdes, both of whom were armed. Van Poyck took Turner's gun and forced him underneath the van. Meanwhile, Valdes forced Officer Griffis to the rear of the van. While under the van, Officer Turner "saw Griffis exit the van; and while noticing two sets of feet in close proximity to the rear of the van, he heard a series of shots and saw Griffis fall to the ground." *Id.* at 1067.

Van Poyck and Valdes were tried separately; Van Poyck was tried first. The central dispute at trial was the identity of the triggerman, with Van Poyck arguing that the evidence showed that Valdes shot Fred Griffis, and the State arguing that the circumstantial evidence showed that Van Poyck fired the fatal shots.[1] Van Poyck was convicted of first-degree murder, and sentenced to death. At this subsequent trial, Valdes was also convicted of first-degree murder and sentenced to death.

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[1] At Valdes' subsequent trial the same prosecutor argued that Valdes was the triggerman; Valdes was subsequently convicted and also sentenced to death. Van Poyck took the stand (at Van Poyck's trial) and vehemently denied shooting the victim or even having seen it occur; Valdes did not testify.

On Van Poyck's direct appeal, the Florida Supreme Court held that the evidence was legally insufficient to establish that Van Poyck was the triggerman, and was legally insufficient to establish premeditation. *Id.* at 1069-70. The court nonetheless went on to uphold Van Poyck's conviction for first-degree felony murder, and upheld his death sentence. *Id.* at 1071. This Court subsequently denied *certiorari* review. *Van Poyck v. Florida*, 499 U.S. 932 (1991).

In December, 1992, Van Poyck filed a post-conviction Rule 3.850 motion in the state trial court wherein he presented numerous issues. After an evidentiary hearing, the trial court denied all relief. On appeal, a divided Florida Supreme Court, in a 4-3 decision, affirmed the denial of relief. *Van Poyck v. State*, 694 So.2d 686 (Fla. 1997). This Court denied *certiorari* review. *Van Poyck v. Florida*, 522 U.S. 995 (1997).

In February, 1997, Van Poyck filed a state habeas corpus petition in the Florida Supreme Court raising three issues, one of which was ineffective assistance of appellate counsel based upon a complete mishandling of one of Van Poyck's direct appeal issues. While this habeas corpus petition was pending, Van Poyck's *pro bono* attorneys uncovered evidence establishing that Van Poyck's direct appeal attorney, William Lasley, had been addicted to drugs (including crack cocaine), was mentally ill, had been convicted of various drug offenses and had been disbarred. Thus, Van Poyck filed a motion to amend his habeas corpus petition to include a claim of *per se* ineffective assistance of appellate counsel, which motion was granted. On May 14, 1998, the Florida Supreme Court, in another 4-3 split decision, denied the habeas corpus petition. The split decision was over the ineffective assistance of appellate counsel claim. The court never mentioned counsel's drug addiction, mental illness, hospitalizations or disbarment, and made no mention at all of the expanded *per se* ineffectiveness claim, despite having previously indicated it would rule on that claim. This Court again denied *certiorari* review. *Van Poyck v. Singletary*, 199 S. Ct. 1252 (1999).

Van Poyck immediately filed a second habeas corpus petition before the Florida Supreme Court, along with a motion for an evidentiary hearing, raising the single claim of *per se* ineffective assistance of appellate counsel based upon counsel's drug addiction, mental illness, and hospitalizations. On December 1, 1998, the Florida Supreme Court denied this habeas corpus petition without opinion or explanation. *Van Poyck v. Singletary*, 728 So.2d 206 (Fla. 1998).

Van Poyck filed a petition for writ of habeas corpus with the United States District Court, Southern District of Florida, on February 3, 1999. The district court denied relief on September 20, 1999. Van Poyck filed an application for certificate of appealability with the district court, and the district court certified two of Van Poyck's 15 raised issues on November 15, 1999. Van Poyck next sought expanded certification from the Eleventh Circuit for 11 of the 13 issues for which the district court denied certification, and the Eleventh Circuit expanded it to include four additional issues on August 30, 2000, but denied certification for the seven others.

Van Poyck appealed to this Court to further expand his certificate of appealability—to include three of the seven issues for which the Eleventh Circuit denied certification—on April 9, 2001. In response, by letter dated May 31, 2001, the Clerk of the Supreme Court of the United States instructed the Clerk for the Eleventh Circuit to "transmit immediately the entire record" in this case to the Supreme Court. The Eleventh Circuit arranged to retain the record to facilitate oral argument and decision on Van Poyck's appeal on the merits of the six issues certified to be heard by the Eleventh Circuit. The Eleventh Circuit subsequently denied relief on May 9, 2002 (see Appendix at B-1 through B-20), and denied Van Poyck's motion for reconsideration on June 21, 2002 (see Appendix at A-2). Van Poyck understands that the record was subsequently transmitted to this Court per its earlier order.

C. Facts Pertaining to Questions Presented

Facts Pertaining To Question I

At Van Poyck's trial, the only real issue in dispute was the identity of the triggerman. During both the guilt phase and the penalty phase, the state vigorously argued and attempted to prove that Van Poyck was the triggerman and that the homicide was premeditated. At the conclusion of the guilt phase the trial court submitted a special verdict form to the jury. Jurors were instructed that if they found Van Poyck guilty of first-degree murder, they were also to check blanks for "premeditated murder," "felony murder," and/or "both." They were to check "premeditated murder" if any juror found Van Poyck guilty of *only* premeditated murder; "felony murder" if any juror found Van Poyck guilty of *only* felony murder; and "both" if any juror found Van Poyck guilty of both. R.2.21.3046-47.[2] After finding Van Poyck guilty of first-degree murder, the jury checked the blank for "felony murder," and checked the blank for "both." *See* State's supplemental filing, vol. A, ROA-4138.[3]

The jury recommended the death penalty by a vote of eleven to one. The trial court, Judge Miller, followed the jury's recommendation and sentenced Van Poyck to death. In his written sentencing order, the trial court judge found that "the State clearly presented competent and substantial evidence as to first-degree murder and/or first degree premeditated murder *and in reality presented competent evidence that Van Poyck may*

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[2] As per Supreme Court Rule 12(7), unless otherwise indicated, record cites are to the Eleventh Circuit Record on Appeal.

[3] The jury verdict form was one of several critical pieces of the record (the others being the trial court sentencing order and the entirety of the state habeas filing) that were never before the district court due to the State's failure to file the complete record as ordered, a circumstance Van Poyck never learned until receiving the docketing statement after the case went up on appeal. Upon Van Poyck's motion in the Eleventh Circuirt, the State filed the missing portions of the record as a supplement. The verdict form can also be found as part of the "Record Excerpts" filed by Van Poyck with the Eleventh Circuit in conjunction with his initial brief to that court.

have in fact been the individual who pulled the trigger and shot Fred Griffis." *See* Appendix at F-3 (emphasis added).

However, on direct appeal the Florida Supreme Court disagreed with Judge Miller and specifically acquitted Van Poyck, on the basis of insufficient evidence, of premeditated murder and of being the triggerman. *Van Poyck v. State*, 564 So.2d 1066, 1069-70 (Fla. 1990). The Florida Supreme Court upheld the death sentence based on felony murder. Yet, because the jury checked the blank for "both," at least one and perhaps as many as eleven (eleven jurors ultimately voted for death) believed the State's argument that Van Poyck was the triggerman and was guilty of premeditated murder.

Facts Pertaining To Question II

Florida dictates by statute that a death penalty decision is made in a separate "penalty phase" proceeding in which existing "mitigating" circumstances are balanced against statutorily prescribed "aggravating" circumstances. The jury is to make a "recommendation," which the trial court adopts or rejects. Here, in adopting the jury's recommendation of death, the trial court found no mitigating and four aggravating circumstances.[4] The trial court's sentencing report noted that Van Poyck had been brought up "in a good family by people that cared for him." Appendix at F-3. As noted above, the trial court also found that "Van Poyck may have in fact been the individual who pulled the trigger and shot Fred Griffis."

The trial court decision may have accurately reflected what was presented at Van Poyck's trial—but it was completely

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[4] Two of the statutory aggravators found by the trial court were largely unrelated to the offense and were automatic based on Van Poyck's status. They were that Van Poyck was on parole at the time of the offense and that he had a prior conviction for a prior felony. The other two were a "great risk of death to many" (a factor which has been challenged in both the direct appeal and in post-conviction proceedings) and that the crime was committed for the purpose of effecting an escape from custody.

at odds with the truth. There was a wealth of mitigating information regarding Van Poyck's family history, upbringing, environment, and mental health, as well as evidence establishing almost to a certainty that Van Poyck did *not* shoot the victim, but Van Poyck's trial counsel failed to investigate, develop or present any of it. The reasons for these failures, and the evidence that was, as a consequence, never presented has now been well documented and is described below.

Circumstances Surrounding Van Poyck's Representation

Van Poyck's lead attorney, Cary Klein, was a general litigation attorney who had never before handled a capital case. R.2.29.1041-42. Klein admitted that he believed a felony murder conviction was a virtual certainty,[5] and that the case would go to a penalty phase proceeding. R.2.29.1145. Nonetheless, Klein performed virtually no pre-trial penalty phase investigation. Instead, he believed that the trial court would give him a one- to three-week continuance between phases. R.2.29.1158-60. As it turned out, no continuance was forthcoming, and the record contains no written or oral order or promise of a continuance. R.2.29.1197-99.

A few months before trial, another attorney, Michael Dubiner, was appointed to assist in Van Poyck's representation. Mr. Dubiner did no work on the penalty phase prior to trial, and assumed that penalty phase investigation was being handled by Klein. R.2.29.849, 866-67.

When the jury convicted Van Poyck, the court announced that it would begin the penalty phase the next day. Only then did Dubiner learn that his assumption that Klein had been handling penalty phase preparation was wrong.

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[5] It should not have been. In fact, under Florida law Van Poyck was not guilty of any underlying felonies that gave rise to felony murder. Unfortunately for Van Poyck, his counsel conceded such underlying felonies. This concession of guilt forms the basis for an ineffective assistance claim that is the subject of the Certiorari Petition filed with this Court on April 9, 2001, and is currently pending.

R.2.29.866-67. Klein had arranged for no investigation of the life history of his client, no mental health evaluations, no witness interviews—in short, nothing had been done with respect to penalty phase. R.2.29.866-67, 923, 974. At a post-conviction hearing, Dubiner admitted that he should have immediately reported the matter, since there was no possibility that any kind of effective or adequate preparation could be done. R.2.29.851-52, 926.

The next morning Klein told the court that if the jury was going to be brought back that day, the defense was not prepared to go forward. The court responded that the penalty phase would start the next morning, and that Klein could have mental health evaluations done that afternoon. R.2.21.3130-34. A mental health expert was hurriedly contacted, but refused to get involved on such short notice. R.2.27.4942-44; R.2.29.853-54. As a result, Klein was by his admission "caught with [his] pants down," having done virtually no investigation or preparation whatsoever. R.2.29.1219.

Klein then "scrambled" to arrange for testimony from a few family members. R.2.29.1200. The last-minute testimony consisted of Van Poyck; Van Poyck's brother Jeffrey, who had 19 prior felony convictions and was, according to Klein, "the most cold and chilling witness [he] had ever seen" and was "hated" by the jury, R.2.29.1103; Van Poyck's aunt, who had to admit she knew little about the defendant; his stepmother, who not surprisingly gave no indication of the "highly destructive environment" she had created; and a nurse who had met Van Poyck in prison.

Counsel did not meet any witnesses until the morning of the hearing, R.2.29.857-58, and there was no opportunity to make any reasoned evaluation of whether to put them on the stand. As a result of the total lack of preparation and investigation, Klein was left with mere suspicions of a number of mitigating circumstances, none of which, by his own admission, he could show. R.2.29.1106. The effect of this

presentation is largely apparent from the trial court's sentencing order, which found no mitigation, and included the flatly wrong finding that Van Poyck "was raised in a good family by people that cared for him."

The Available – and Unpresented – Evidence of Mitigation

There was an enormous amount of mitigation evidence that was available had counsel only sought it. Counsel knew that Van Poyck's mother had died when he was very young, and that the household in which he grew up was "bizarre." R.2.29.1173. But Counsel never investigated these facts, never talked to key family members, and never presented any of this information to a mental health expert.

If counsel had investigated, they would have learned that one of the Van Poyck housekeepers, Ms. Dano, frequently beat Van Poyck and his siblings with wooden coat hangers and locked them in closets. She threatened to chop them into pieces and feed them to the dogs. R.2.24.2881, 2910. Van Poyck's brother Jeff also frequently abused him and beat him often—on one occasion knocking him unconscious. *Id.*

Eventually, Van Poyck's great aunt, Phyllis, moved into the household to care for the children. Phyllis had been diagnosed as suffering from Major Depression and was being treated with Electroconvulsive Therapy, or ECT. R.2.24.2922. She was later diagnosed as bipolar and treated with Lithium. *Id.* Aunt Phyllis was subject to violent mood swings, drank heavily, abused pain killers, and was generally erratic and unstable. R.2.2.378. One family member described her as "just a number one crackpot" and "psychotic." R.2.28.409.

When Van Poyck's father eventually remarried, things became worse. A contemporaneous HRS report—which was in Van Poyck's Department of Corrections file and was never seen by trial counsel—described Van Poyck's stepmother as "totally destructive in her open, maniacal hostility toward the children and her fanatical attitude of puritanical virtue that she bestows

upon herself and evil and corruption which she assures reside in the children." The report went on to recommend Van Poyck's "revocation, not as a means of rehabilitating, but as a means of immediately removing [Van Poyck] from a highly destructive environment." R.2.26.4115. The "revocation" consisted of sending Van Poyck to the notorious Florida School for Boys in Okeechobee. R.2.25.3814.[6]

Evidence was presented, in the form of an opinion from Dr. Phillips, that Van Poyck suffered from diffuse organic brain syndrome, which is currently in remission, as well dependent personality features that drove his conduct and led to impaired judgment on the date of the offense. R.2.28.609-10.

The Available – and Unpresented – Evidence that Van Poyck Did Not Shoot the Victim

Trial counsel's errors were not confined to a failure to investigate his client's history, but also included a failure to develop and introduce evidence relating directly to the one issue addressed at trial—who shot and killed the victim. Serological testing showed that Van Poyck's co-defendant, Frank Valdes, had blood on his clothes of a type that matched that of the victim, and that blood on Van Poyck's clothing did not. R.2.28.543-44. Furthermore, it was undisputed that the victim was shot at close range.

It was critical, then, that this serological evidence be introduced and argued to the jury as tending to establish that Van Poyck did not shoot the victim, but rather, as he testified, that he was taken totally by surprise by the shooting. In fact, Klein represented to the court that this testing was "crucial" to

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[6] The abuses at Okeechobee have been well chronicled. As for Van Poyck's experiences there, it was shown at the hearing that he was hog tied, drenched in water and left overnight in the "wet room," and frequently sent to the "ice cream room," where he was given thirty licks with straps and paddles, the process being repeated if he cried out during the beating. R.2.28.486-498. He also witnessed other children being sexually abused, and was placed under the supervision of older and larger offenders. R.2.28.205-09.

the case. R.2.17.317. However, no DNA testing was in fact performed. Klein claimed at the evidentiary hearing that his decision was "tactical"—the existing serological evidence, he claimed, was sufficient to prove his point.

The problem with this "tactical decision" is that Klein inexplicably *never* introduced the serological testing that supposedly made the DNA testing unnecessary.[7]

Counsel also failed to introduce evidence that the murder weapon was not in Van Poyck's possession. Sales records indicated that the murder weapon was purchased by Lori Sondik, the girlfriend of Van Poyck's co-defendant, Frank Valdes. State's Supplemental Filing, Ex. B. Ms. Sondik testified that not only did the murder weapon belong to Valdes, but that he left on the morning of the offense with that weapon tucked in his waistband. Unfortunately, however, she did not testify to this at *Van Poyck's* trial, but at *Valdes'* trial, months later. R.2.24.2711-15. Klein knew this was an issue before trial but never did anything about it. R.2.22.1088.

Facts Pertaining To Question III

At Van Poyck's trial, defense counsel used all ten of his allotted peremptory challenges, complained that the judge had forced him to use several of those challenges on jurors who should have been excused for cause, and requested an additional peremptory challenge to use against juror Moody. In response,

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[7] When confronted with this fact at the evidentiary hearing, Klein had to admit that the serologist's report was not offered at trial, and that the serologist was not called at trial. Klein *then* claimed that the reason for this was that he presented "some indication" of blood type evidence "through the back door":

> A: If I remember correctly we got it in the back door. We got some indication through one of the other officers, not directly from Tanton, some indication.

R.2.29.1212. In fact, the trial court record reveals that *no* blood type evidence came in—"through the back door" or otherwise. No witness testified as to blood type evidence at either phase, and it was never mentioned at closing argument for the defense.

the court offered to make a "deal" with defense counsel: the court would grant an additional peremptory challenge, but only if counsel agreed to allow the judge to excuse for cause a prospective juror (Mr. Chase) who had not yet been questioned on *voir dire*. R.1364. Defense counsel declined to accept this "bargain," and the Court refused to grant any additional peremptory challenges. Accordingly, juror Moody sat on the jury, as well as juror Bradford (who also indicated a pro-death bias and was unsuccessfully challenged for cause).

In Van Poyck's direct appeal, his appointed appellate attorney, William Lasley, submitted a brief arguing, *inter alia*, that Van Poyck had been denied a fair and impartial jury because the trial court improperly denied numerous motions to strike various prospective jurors for cause due to their bias in favor of the death penalty. The argument supporting this claim consisted solely of two sentences and cited no case law whatsoever. Mr. Lasley named two specific jurors: jurors Abufaris and Bruschi. Unfortunately for Van Poyck, and for reasons that were then unknown, Mr. Lasley had named the *wrong two jurors*: prospective jurors Abufaris and Bruschi were later excused for personal reasons and Van Poyck was never required to use peremptory challenges to strike them. It is undisputed that Lasley should have named jurors Moody and Bradford—two jurors unsuccessfully challenged for cause and who ultimately sat on the jury.

On direct appeal, the Florida Supreme Court denied this claim—unsurprising since Mr. Lasley had named the wrong two jurors. The Florida Supreme Court stated:

> We note, that although the pro-death jurors should have been excused for cause, the trial judge subsequently excused them for personal reasons. Consequently, Van Poyck was not required to exercise any peremptory challenges with regard to those jurors and that issue is moot.

Van Poyck v. State, 564 So.2d 1066, 1071 (Fla. 1990).

REASONS FOR GRANTING THE WRIT

The issues raised herein present compelling questions of Constitutional law concerning the safeguards this Court has insisted upon to ensure reliability, proportionality, and fairness in dispensing the death penalty.

Issue I revolves around the incongruity between the jury and trial court finding that Van Poyck was the triggerman and the Florida Supreme Court's having correctly ruled that the evidence was insufficient to support this finding—but that the death penalty should nonetheless be upheld under the felony murder doctrine. The issue is whether a death sentence meted out by a sentencing body that wrongly finds the defendant killed the victim should be upheld because that same sentencer concludes that the defendant was guilty of felony murder. This Court has never before considered this issue. It presents an important corollary to the body of case law, starting with *Stromberg v. California*, 283 U.S. 359 (1931) and running through *Sochor v. Florida*, 504 U.S. 529 (1992) concerning the reliability of a sentencing body's findings.

The second and third issues concern ineffective assistance of counsel, though in considerably different contexts. Issue II asks if counsel's failure to present evidence that would have almost certainly shown Van Poyck not to be the triggerman is prejudicial—and whether prejudice should somehow be determined by how vociferously the prosecutor argued the triggerman issue during the penalty phase. [8]

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[8] This claim was the subject of a sharply divided, 4-3 decision by the Supreme Court of Florida. There, the dissenting justices described this claim: "The undisputed facts in this case present a blatant example of counsel's failure to investigate and prepare a penalty phase defense. Once again, we have a lawyer appointed who had absolutely no experience in capital cases . . . an inexperienced lawyer who has conceded that he was unprepared and, in his words, "caught with [his] pants down" . . . Knowing what we do now, we should not give our approval to a sentence of death predicated upon a patent case of ineffective assistance of counsel. In doing so we are simply providing additional support to the already considerable body of evidence that the death

Similarly, Issue II also involves a misapplication of *Strickland*, with respect to the investigation of a standard mitigation case, based on Eleventh Circuit precedent that asks only whether *any* hypothetical "reasonable attorney" would have presented the same case put on by defense counsel. That standard invites courts to ignore what investigative activities were actually undertaken to come up with precisely the kind of post-hoc rationalizations the courts below did here, and completely undercuts *Strickland's* clear mandate that courts not be affected by the "distorting affects of hindsight" in assessing trial counsel performance.

Issue III concerns ineffective assistance of appellate counsel—a context in which ineffectivensss has never been considered by this Court. Here, the deficiency in appellate counsel's performance—which stemmed from drug addiction, mental illness and a complete delegation to his client of the task of writing the appellate brief—has never been questioned—and, indeed, raises a serious question of *per se* ineffectiveness that is currently before this Court in a separate *certiorari* petition. The issue that arises is prejudice under *Strickland* and whether a court assessing prejudice can reach the conclusion that there was no prejudice—i.e., that there is not a reasonable probability that the outcome would have been different—by the simple expedient of changing the standards it previously applied in the same case on direct appeal.

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penalty process is seriously flawed by the legal system's tolerance of incompetent counsel." *Van Poyck v. State*, 694 So.2d 686 (Fla. 1997) at 699-701.

ARGUMENT I

BECAUSE HIS JURY INDICATED ON ITS VERDICT FORM THAT SOME OF ITS MEMBERS BELIEVED VAN POYCK WAS THE TRIGGERMAN AND GUILTY OF PREMEDITATED MURDER, YET THE FLORIDA SUPREME COURT SUBSEQUENTLY ACQUITTED VAN POYCK OF PREMEDITATION AND OF BEING THE TRIGGERMAN (DUE TO INSUFFICIENT EVIDENCE), THOSE GROUNDS ARE INVALID AND VAN POYCK'S DEATH SENTENCE IS UNRELIABLE IN VIOLATION OF THE EIGHTH AMENDMENT.

Van Poyck's death sentence was recommended by a jury which indicated on its verdict form that as many as eleven of its members believed he was the triggerman in a premeditated murder. There has never been any doubt about this point, as it is reflected in the jury's own verdict form.

At the conclusion of the guilt phase, the trial court submitted a special verdict form to the jury. Jurors were instructed that if they found Van Poyck guilty of first-degree murder, they were to check blanks for "premeditated murder," "felony murder," and/or "both." They were to check "premeditated murder" if any juror found Van Poyck guilty of only premeditated murder; "felony murder" if any juror found Van Poyck guilty of only felony murder; and "both" if any juror found Van Poyck guilty of both. After finding Van Poyck guilty of first-degree murder, the jury checked the blank for "felony murder," and checked the blank for "both." Hence, as many as eleven jurors believed the State's theory of the case: that Van Poyck was the triggerman and guilty of premeditated murder. The jury, by a vote of eleven to one, recommended death.

The trial judge followed the jury's recommendation and sentenced Van Poyck to death. In following the jury's recommendation, the trial judge also agreed with the State's

theory of the case, as is clear from his "factual findings" to support the death sentence:

> The Court further finds that the State clearly presented competent and substantial evidence as to the crime of first-degree murder and/or first-degree premeditated murder *and in reality presented competent evidence that Van Poyck may have in fact been the individual who pulled the trigger and shot Fred Griffis.*

Appendix at F-3 (emphasis added).

Given its view of the evidence, the trial court obviously gave no instruction to the jury prohibiting it from considering Van Poyck as the triggerman or as guilty of premeditated murder during its sentencing deliberations.

On direct appeal, however, the Florida Supreme Court looked at the paucity of evidence on the triggerman issue and held that the evidence was insufficient to convict Van Poyck of premeditated murder. This determination is consistent with Van Poyck's having maintained all along that he did not, in fact, pull the trigger or act with premeditation. The sole basis supporting the death sentence in this case, then, is felony murder. The Florida Supreme Court stated:

> [W]e agree with Van Poyck that the evidence is insufficient to establish first-degree *premeditated* murder . . . Although the evidence is insufficient to establish first-degree premeditated murder, we find that the evidence was clearly sufficient to convict him of first-degree felony murder. While this finding does not affect Van Poyck's guilt, *it is a factor that should be considered in determining the appropriate sentence.*

Van Poyck v. State, 564 So.2d 1066, 1069-70 (Fla. 1990) (emphasis added).

The Florida Supreme Court's phrase above, that Van Poyck's acquittal of premeditated murder "should be considered in determining the appropriate sentence" is ironic, in that the Florida Supreme Court did not but should have simply remanded the case for such consideration. Instead, the Florida Supreme Court used this phrase as a segue to consider other, less-direct death-penalty-related implications (such as whether the sentence passed muster under this Court's *Edmund / Tison* requirements). The Florida Supreme Court inexplicably failed to address the more direct concern: whether the death penalty was unreliable in light of the fact that the trial judge and a portion of the jury were wrong about something as basic as whether the evidence showed that Van Poyck pulled the trigger.

Viewed in this light, it is amazing that Van Poyck has now reached his last recourse with respect to this issue—and that no court below has simply granted Van Poyck a new penalty phase. Most recently, on habeas review, the federal district court dismissed this issue in a single sentence—never mind that when it did so it did not (unbeknownst to Van Poyck) even have the full record, including the verdict form or sentencing order, before it. The Eleventh Circuit reasoned this issue away by citing *Sochor v. Florida*, 504 U.S. 527 (1992), and stating:

> We have no good reason to think that the jury relied on something more than the factually supported theory of felony murder.

Van Poyck v. Moore, 290 F.3d 1318 (11th Cir. 2002); Appendix at B-17.

But doesn't the jury's verdict form provide a "good reason" to think that the jury relied on something more than just felony murder? Because the jury checked the blank for "both," there is documented evidence that the jury wrongly believed that premeditated murder was also a "factually supported" theory. The Eleventh Circuit's contention that the verdict form speaks only to what the jury was thinking at the *guilt* phase, and

not at all to what it was thinking at the *penalty* phase, is hard to fathom—unless we are to believe that jurors erased their memories or consciously undertook not to consider what they had already indicated they believed (which, of course, they would not, in the absence of any instruction from the judge).

Equally perplexing is the Eleventh Circuit's rationale that, to get to the bottom of what the jury actually considered at penalty phase, we should focus not on the jury's own verdict form (and common sense), but on closing arguments. *Id.* Discounting what we know the jury believed (from the verdict form it actually filled out) and substituting speculation about what the jury thought of the State's closing argument sadly smacks of make-shift reasoning fashioned to reach a particular result.[9]

In this case, then, *Sochor* has been badly misapplied. Thus, at a minimum, this case should compel a summary remand. It also presents the Court with the opportunity to articulate an obvious corollary to *Sochor*. *Sochor* merely extends the rule of *Griffin v. United States*, 502 U.S. 46 (1991) from general verdicts, where one of several theories is unsupported, to jury sentencing considerations, where one of several jury sentencing bases is unsupported. The whole rationale of *Griffin* and *Sochor* is that jurors, as capable fact-finders, should be given the benefit of the doubt regarding whether they relied on supported versus unsupported grounds—*when it cannot be determined on what grounds they relied.* The obvious point in the present case is that we can determine the grounds on which the jury relied, from its own verdict form.

The fact that as many as eleven jurors thought Van Poyck was the triggerman, as the jury itself made clear in its

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[9] Further, even on the Eleventh Circuit's reasoning, the fact of the matter is that the State repeatedly argued that Van Poyck was the triggerman at the penalty phase. *See, e.g.*, R.2.21.3511-12, 3522, 3524-25. Indeed, at guilt phase the prosecutor told the jury that the triggerman issue "was irrelevant to guilt phase and has more bearing as to the penalty. . . ." R.2.20.2913.

verdict form, leaves no room for doubt that Van Poyck's sentence was based at least partially on invalid grounds. Thus, this is a case in which there is no room for giving the jury the benefit of the doubt. That being the case, this case is one that should have been—and is—controlled by the line of cases beginning with *Stromberg v. California*, 283 U.S. 359 (1931) and *Mills v. Maryland*, 486 U.S. 367 (1988). This Court should adopt the rule that where a jury reaches two factual conclusions, one which is valid and the other which is not, no death sentence can stand unless it can be reasonably determined that the verdict did *not* rest on the unsupported ground.

Applying such a rule would warrant relief in the form of a new sentencing hearing. There is an enormous and dramatic difference between a jury's contemplation of a defendant it views as guilty only of felony murder versus one who it views as the triggerman. Indeed, that difference is the core concern animating this Court's line of cases beginning with *Edmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987). In *Tison*, the Court reviewed then-current death row population statistics and noted that of 739 death row inmates, only 41 did not participate in the fatal assault, all but 16 of those 41 were present at the scene of the murder, and only 3 of those 16 were sentenced to death absent a finding they had collaborated in a scheme designed to kill. The Court pointed to these statistics as "persuasive evidence that American juries consider the death sentence disproportional to felony murder *simpliciter*." *Id.* at 148. Failing to distinguish *Sochor* and *Griffin* on facts such as ours, where the jury indicated that it believed the unsupported theory that Van Poyck pulled the trigger, flies in the face of the stringent rules this Court has developed to demand reliability in death cases.

ARGUMENT II

VAN POYCK WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE WHEN HIS LAWYER FAILED TO CONDUCT A PRE-TRIAL INVESTIGATION AND FAILED TO INTRODUCE EVIDENCE SHOWING THAT VAN POYCK WAS NOT THE TRIGGERMAN, DUE TO A MISTAKEN BELIEF THAT THERE WOULD BE AN EXTENSION OF TIME BETWEEN THE GUILT AND PENALTY PHASES

In *Williams v. Taylor*, 529 U.S. 362 (2000), this Court explained when a state court decision was "contrary to" or involved an "unreasonable application of" its precedent in the context of an ineffective assistance of counsel claim. This Court explained that a state court decision is "contrary to" Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in this Court's cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court" and arrives at a different result. With respect to the "unreasonable application of" prong of the statute, this Court found that a federal habeas court should grant a habeas writ "if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principal to the facts of the prisoner's case."

Applying these principles, this Court ruled that Williams' counsel had been constitutionally ineffective. This Court focused on a broad range of factors, including the nature of the crime and aggravating evidence of other unadjudicated offenses, the mitigating evidence that *was* presented at trial, the counsel's stated trial strategy, and the undeveloped mitigating evidence presented in habeas corpus proceedings. This Court held as both "contrary to" the governing law, i.e., *Strickland v. Washington*, 466 U.S. 668 (1984), and "an unreasonable application" thereof, the lower court findings that counsel's

performance was not deficient. This Court also found prejudice, concluding that the mitigating evidence not presented at trial but offered at the post-conviction stage "might well have influenced the jury's appraisal of Williams' moral culpability." *Id.* at 1515.

Van Poyck's representation was equally deficient. While Williams' counsel was inexperienced in capital cases and had done no penalty phase investigation or preparation, the same was true for Van Poyck: counsel put off all investigative activities for penalty phase until after the guilt phase was over, counting on a one- to three-week extension between phases that never materialized. As a result, a vast array of potentially mitigating evidence—from the horrendous circumstances of Van Poyck's childhood, to various mental health issues to evidence establishing that he did not shoot the victim—were never investigated or presented.

On the other hand, a fully prepared case for life was not going to be nearly so hard to make as it would be in *Williams*. Williams had beaten an elderly man with a wooden club, retrieved $3.00 from the victim's wallet as he lay gasping for breath, and left him to die. At sentencing, the jury learned that Williams had engaged in a series of brutal assaults on elderly victims shortly after that crime: he set fire outside a man's home to facilitate a violent attack and robbery on the occupant, and he beat an elderly woman so severely that she was left in a permanent vegetative state. Williams had an extensive prior record, including convictions for armed robbery, burglary, and grand larceny—and had been convicted of arson for setting fire to the jail while he awaited trial on his capital murder case. Finally, two psychological experts who examined Williams prior to trial told the jury that "there was a high probability that he would commit future criminal acts of violence and that he constituted a continuing threat to society." Despite these facts, this Court ruled that Williams was entitled to a new sentencing hearing.

Contrast that with the situation in the present case: Van Poyck, recently paroled from a life sentence (one he had received at age 17 for armed robbery), made an amateurish attempt to break his long-time mentor, James O'Brien, out of jail and made the unfortunate choice of bringing Frank Valdes along to assist. For reasons that are not known to this day, Valdes shot and killed a prison guard during the abortive escape attempt. All of the aggravating factors in Van Poyck's case were automatic, based on his status as a parolee and the circumstances of the underlying felony (i.e., it involved an attempted escape in a public setting).

Why, then, was Van Poyck denied relief? A major reason may lie in the impossibly high standard for these claims that the Eleventh Circuit set—ironically only a few weeks after this Court's decision in *Williams*—in *U.S. v. Chandler*, 218 F.3d 1305 (11th Cir. 2000), a standard that one Eleventh Circuit judge lamented at the time of its formulation "virtually forecloses any future *Strickland* claim of ineffective assistance during the penalty phase of a capital proceeding." *Chandler*, 218 F.3d 1361 (Wilson, J. dissenting).[10] *Chandler* set out 12 "principles" that it said governed ineffectiveness claims. Chief among these was its creation of a "hypothetical" reasonable attorney against whom counsel's conduct was to be judged: relief would be granted under this test only if "some reasonable lawyer at the trial could have acted in the circumstances, as defense counsel acted at trial." This test has since been repeatedly used in the Eleventh Circuit, including in this case. It also has been cited elsewhere—including in other circuit courts.[11] And it is squarely at odds with this Court's decision in *Strickland* and *Williams*.

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[10] Two years of post-*Chandler* jurisprudence has, at least so far, proven Judge Wilson's dissent to be prescient. The Eleventh Circuit has considered 11 ineffective assistance claims since that time and denied relief in all 11.

[11] *See Bullock v. Carver*, 297 F.3d 1036, 1049 (10th Cir. 2002) (citing *Chandler* to support the view that, even when there are some unreasonable decisions, counsel's performance is not deficient if "a 'hypothetical counsel'

This Court has never held that it is sufficient performance if some "reasonable" attorney—any reasonable attorney, anywhere—would have put on the same case as defense counsel. *Strickland* holds that "counsel has a duty to make reasonable investigations or to make a reasonable decision that that make particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Under *Strickland*, a reviewing Court is duty bound to review the trial and habeas record to discern the *actual* strategy (if any) employed by trial counsel and actions taken in pursuance of that strategy, and then assess the reasonableness of the attorney strategy and conduct as measured not against what "any reasonable attorney" would have done, but against prevailing professional norms and the available evidence and facts brought to light in habeas corpus proceedings.

The *Chandler* "any reasonable attorney" test invites courts to engage in after-the-fact rationalizations of a defective performance by coming up with strategic decisions not to investigate *that were never actually made*. Under *Chandler* one need only determine whether the case put on by defense counsel is one that "any reasonable attorney" could have put on. That means if a particular line of defense could have been found abandoned due to some strategic choice or investigation, there is no deficiency in counsel's performance—never mind that no such strategic choice or investigation was actually made.

Indeed, that was largely what occurred here. Nowhere does the Eleventh Circuit decision in this case discuss the steps Klein took to investigate penalty phase issues. Nowhere does the Eleventh Circuit discuss what witnesses counsel interviewed, what mental health evaluations were conducted or what preparations were made for penalty phase. Nowhere does the Eleventh Circuit discuss the real reason that Klein failed to prepare any kind of penalty phase case—that he was counting on an extension of time between phases that did not exist.

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could have taken the same action").

This failure to analyze counsel's actual conduct flies in the face of *Strickland*, which necessarily entails scrutiny of the attorney's actual performance and strategy at trial. Indeed, it was to "avoid the distorting effect of hindsight" that *Strickland* cautions:

> Thus a Court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. 466 U.S. at 690.

Viewed in this light, it is abundantly clear that both the Florida Supreme Court majority decision reviewing Klein's conduct, as well as the Eleventh Circuit opinion reviewing it were "contrary to" and an "unreasonable application" of *Strickland*.[12]

Similarly, the decisions below with respect to the unpresented evidence on the triggerman issue also involved an unreasonable application of *Strickland*. The Florida Supreme Court did not analyze the triggerman issue at all in 1996; the Eleventh Circuit did so only under a prejudice analysis. Essentially, the Eleventh Circuit found that it would have made no difference to the jury's recommendation of death as to whether Van Poyck was the triggerman or not. This was an unreasonable application of *Strickland* for at least two reasons. First, as demonstrated in the preceding discussion of Issue I, *supra*, this Court has long held that the appropriateness of the death penalty depends in large measure on the nature of the offense. Indeed, intuitively, the idea that it "makes no difference" as to whether or not the defendant is the one who actually killed the victim is nonsense. To our knowledge, no court has anywhere ruled that a failure to present evidence going to who shot the victim was not prejudicial on the basis

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[12] If hindsight has any place in ineffective assistance of counsel claims, it is in the prejudice prong of *Strickland*, where the burden of proof for the petitioner is considerably relaxed; i.e., the petitioner need only show that there is a reasonable probability that the result would have been different.

that an alternative felony murder theory could have also resulted in the death penalty.

Second, the notion that it would have "made no difference" as to whether or not Van Poyck pulled the trigger is completely undercut by this Court's decisional law in *Enmund, supra* and *Tison, supra* which impose specific requirements before a death sentence can be constitutionally imposed on a non-triggerman defendant—it must be shown that a defendant killed, intended to kill or was a major participant in the underlying felony and contemplated use of lethal force. There is good reason to believe that the jury made the requisite *Enmund/Tison* findings in this case *only* because it wrongly believed that Van Poyck was the triggerman—the verdict form tells us to an absolute certainty that as many as eleven of the jurors did in fact believe that Van Poyck pulled the trigger, making the *Edmund/Tison* findings an unfairly easy call for this jury. The Eleventh Circuit findings that it "would not have mattered" is simply unreasonable under these circumstances.

ARGUMENT III

VAN POYCK WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL, UNDER THE TWO-PART *STRICKLAND* STANDARD, WHEN HIS COURT-APPOINTED, DRUG-ADDICTED, MENTALLY ILL ATTORNEY (WHO HAS SINCE BEEN DISBARRED) BOTCHED THE APPEAL OF A JUROR ISSUE BY NAMING THE WRONG TWO JURORS, THUS DOOMING AN OTHERWISE MERITORIOUS ARGUMENT

Van Poyck's direct appeal was handled by a court-appointed lawyer, William Lasley, who was a drug addict (crack cocaine), suffered from mental illness, was in the midst of a mental breakdown while he represented Van Poyck, has since been disbarred, and pled insanity at his subsequent criminal prosecution. Van Poyck has pending before this Court a petition for *certiorari* seeking a certificate of appealability so

that the Eleventh Circuit may hear his argument that Lasley's performance was so egregious as to constitute "per se" ineffectiveness under *Strickland v. Washington*, 466 U.S. 668 (1984), such that Van Poyck need not show specific prejudice. In the present petition, Van Poyck argues that even if it was not "per se" ineffective, Lasley's performance was ineffective under *Strickland's* two-prong test.

With respect to *Strickland's* first prong, Lasley's deficient performance is beyond question. Sadly, given Lasley's drug addiction and significant mental problems, he was unable even to write Van Poyck's appellate brief—so that, instead, Van Poyck wrote it himself. Van Poyck briefed a juror issue (in a two sentence "argument") arguing that the trial court had improperly forced him to waste peremptory challenges on jurors who should have been excused for cause.[13] Because Van Poyck did not have access to the record, however, Lasley had to at least fill in several blanks with the names of the jurors to be challenged. Lasley typed up verbatim the handwritten draft of the brief prepared by his client—and filled in the wrong names.

A. The Florida Supreme Court's Decision

The Florida Supreme Court itself provided the basis to support Van Poyck's claim that the jurors he challenged for cause were in fact biased in favor of the death penalty. The Florida Supreme Court revealed its true thinking as to those jurors indirectly when it considered the argument presented in Lasley's botched brief which named the wrong two jurors. In his botched brief, Lasley named jurors Bruschi and Abefarmis (who, in fact, were excused on other grounds and never required Van Poyck to strike via peremptory challenge) when he should

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[13] Under clearly established Florida law, it is reversible error for a court to force a defendant to use his or her peremptory challenges on potential jurors who should have been excused for cause, provided that the defendant subsequently exhausts all of his or her peremptory challenges and seeks an additional peremptory challenge but is denied. *See, e.g., Cummings v. State*, 715 So.2d 944 (Fla. 1998) (citing cases).

have named jurors Moody and Bradford. When the Florida Supreme Court read Lasley's botched brief and considered Bruschi and Abefarmis it first made the obvious point that Bruschi and Abefarmis were excused for other reasons—and hence, any such issue as to them was moot. *Van Poyck v. State*, 564 So.2d at 1071. But the Florida Supreme Court—in its unanimous opinion—also said something else: that had Bruschi and Abefarmis not been excused for other reasons, *their bias would have required that they be excused for cause*:

> We note that, although *the pro-death jurors* [Bruschi and Abefarmis] *should have been removed for cause*, the trial judge subsequently excused them for personal reasons. Consequently, Van Poyck was not required to exercise any peremptory challenges with regard to those jurors and the issue is moot.

Id. (emphasis added).

The Florida Supreme Court having thus set the standard as to the level of bias requiring removal for cause, Van Poyck went back to the Florida Supreme Court to argue (by comparing their *voir dire* answers) that Moody and Bradford showed themselves to be even more biased that Bruschi and Abefarmis[14]—and hence that by botching this issue and failing to name Moody and Bradford in 1990, Lasley was ineffective.

Amazingly, however, a majority of the Florida Supreme Court, without explanation, flip-flopped when this issue was presented on habeas in 1997. The Florida Supreme Court held, in short, that Bruschi and Abefarmis did not provide a basis of comparison on which Van Poyck could rely because Bruschi and Abefarmis were not so biased after all:

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[14] The relevant portions of the at-issue jurors voir dire are set forth at pages 935-939 of *Van Poyck v. Singletary*, 715 So.2d 930 (Fla. 1998).

> We have re-examined the voir dire of the jurors who were challenged for cause and were the subject of the initial appeal . . . On a re-examination of the record, we find that the trial judge properly exercised his discretion in denying the challenge for cause to each of these jurors.

Id. at 934.

Beyond the fact that this flip flop is inexcusable in any case—much less a death penalty case[15]—it also illustrates that the Florida Supreme Court utterly failed to frame Van Poyck's ineffective assistance claim properly. In other words, the issue before the Florida Supreme Court was not whether, looking at the issue anew, the at-issue jurors were or were not biased, but whether, under the *Strickland* two-prong test, had Lasley named the correct two jurors *in 1990*, there was merely a reasonable probability that the outcome would have been different, in light of that Court's stated view of bias in 1990. The Florida Supreme Court's opinion was thus contrary to and involved an unreasonable application of this Court's precedent.[16]

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[15] The flip flop by the Florida Supreme Court resulted in a blistering dissent, which stated: "And of course, [the majority's] abrupt about-face is done with absolutely no analysis other than the fact that today's majority disagrees with our prior unanimous opinion. *Kind of scary, isn't it*?" *Van Poyck v. Singletary*, 715 So.2d 938 (emphasis in original).

[16] Because the Eleventh Circuit never performed a *Strickland* analysis, it never considered the effect of related, limiting cases, such as *Lockhart v. Fretwell*, 506 U.S. 364 (1993). In anticipation of this Court's analysis of *Strickland* and progeny with respect to this issue, Van Poyck notes that his asking whether, had his counsel performed effectively, there was a reasonable probability that the outcome would have been different *in 1990*, does not amount to his asking for a "windfall" under *Lockhart*. *See id.* at 366. Van Poyck is not asking for a windfall, because the law of juror bias did not and has not changed. This is not a situation in which, through reasoned development of the law, prior cases have been overruled. The only change was the Florida Court's unreasoned change in application of the law to Van Poyck, in his own case.

B. The Eleventh Circuit Decision

Unfortunately, even after habeas review at two levels of the federal courts, Van Poyck is still awaiting a proper application of this Court's two-prong *Strickland* standard. Most recently, despite Van Poyck's arguing repeatedly in briefs and oral argument that this is a *Strickland* claim regarding his appellate lawyer's deficient performance, the Eleventh Circuit improperly analyzed the issue (as did the Florida Supreme Court) by purporting to determine anew whether the at-issue jurors were or were not biased. Van Poyck is at a complete loss to understand how the Eleventh Circuit never once managed to cite *Strickland* in treating this *Strickland* claim. Instead, the Eleventh Circuit cited cases regarding juror bias—as part of an analysis regarding whether the Eleventh Circuit perceived juror bias. While it is nice to have the Eleventh Circuit's thoughts on what the constitutional standards are regarding juror bias, again, the issue in this case is what the Florida Supreme Court said constituted juror bias *in 1990*—and, crucially, whether, given what it said about juror bias in 1990, Van Poyck was prejudiced under *Strickland* when his drug-addicted lawyer named the wrong two jurors in an appeal brief Van Poyck himself was forced to write.

CONCLUSION

WHEREFORE, based upon all of the foregoing, Petitioner respectfully petitions this Court to grant *certiorari* review.

Respectfully submitted,

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Jeffrey D. Peelen
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APPENDIX

June 21, 2002 Order of the United States Court of Appeals for the Eleventh Circuit, denying Petitioner's Motion for Reconsideration	A2
Van Poyck v. Moore, 290 F.3d 1318 (11th Cir. 2002)	B1-B20
Van Poyck v. Singletary, 715 So.2d 930 (Fla. 1998)	C1-C22
Van Poyck v. State, 694 So.2d 686 (Fla. 1997)	D1-D30
Van Poyck v. State, 554 So.2d 1066 (Fla. 1990)	E1-E9
December 21, 1988, Sentencing Order by the Circuit Court of the Fifteenth Judicial Circuit of Florida in and for Palm Beach County	F1-F5
Constitutional Provisions and Statutes Involved	G1-G2

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED

No. 99-14734-P

WILLIAM VAN POYCK,

Petitioner-Appellant,

v.

FLORIDA DEPARTMENT OF CORRECTIONS, MICHAEL W. MOORE, Secretary of Florida Department of Corrections,

Respondent-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

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BEFORE: EDMONDSON, BLACK and MARCUS, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant, William Van Poyck, is **DENIED**.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

APPENDIX B
UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

William VAN POYCK,
Petitioner-Appellant,

v. No. 99-14734

FLORIDA DEPARTMENT OF CORRECTIONS,
Michael W. Moore, Secretary of Florida
Department of Corrections,
Respondents-Appellees.

[May 9, 2002]
Rehearing Denied June 21, 2002

PER CURIAM:

In 1988, Petitioner William Van Poyck was convicted of murder and sentenced to death by a Florida court.[1] Van Poyck brought this petition for habeas corpus in federal district court, pursuant to 28 U.S.C. § 2254. The district court rejected his petition. These issues were certified for appeal: 1) whether Petitioner received ineffective assistance of counsel during the

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[1] Petitioner's conviction and sentence were affirmed on direct appeal. *See Van Poyck v. State,* 564 So.2d 1066 (Fla.1990), *cert. denied, Van Poyck v. Florida,* 499 U.S. 932, 111 S.Ct. 1339, 113 L.Ed.2d 270 (1991) (hereinafter "*Van Poyck I*"). Petitioner sought post- conviction relief in Florida state court, but was unsuccessful. *See Van Poyck v. State,* 694 So.2d 686 (Fla.1997) (rejecting Petitioner's motion, brought under Fla. R.Crim. P. 3.850, to vacate his conviction and sentence), *cert. denied, Van Poyck v. Florida,* 522 U.S. 995, 118 S.Ct. 559, 139 L.Ed.2d 400 (1997) (hereinafter "*Van Poyck II*"); *Van Poyck v. Singletary,* 715 So.2d 930 (Fla.1998) (rejecting Petitioner's petition for habeas corpus), *cert. denied,* 526 U.S. 1018, 119 S.Ct. 1252, 143 L.Ed.2d 349 (1999) (hereinafter "*Van Poyck III*").

penalty phase of his trial; 2) whether the trial court erred when it denied Petitioner a continuance between the guilt and penalty phases of his trial; 3) whether Petitioner received ineffective assistance of counsel during appellate proceedings; 4) whether the trial court failed to consider properly all of the mitigating evidence before it; 5) whether Petitioner's sentence is based on an invalid aggravating factor; and 6) whether the state withheld exculpatory evidence, in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). We affirm the district court's ruling on each of the issues.[2]

Background

The facts giving rise to Petitioner's conviction and sentence are discussed in the Florida Supreme Court's opinions dealing with this case. *See Van Poyck I,* 564 So.2d at 1067-68. We will summarize the facts briefly. In June 1987, Florida inmate James O'Brien—a friend of Petitioner—was scheduled to be transported to a doctor's office by two Florida corrections officers: Steven Turner and Fred Griffis. When the van in which these three men were traveling reached the doctor's office, Petitioner and an accomplice (Frank Valdes)—who were both armed—approached the vehicle. Petitioner took Officer Turner's gun and forced him under the van. While he was under the van, Officer Turner saw Officer Griffis get out of the van and saw Valdes force Officer Griffis to the back of the van. Then, Officer Griffis was shot and killed.

Petitioner was charged with and tried for first-degree murder.[3] The prosecution argued two different theories to

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[2] We see no merit to Petitioner's argument on issue 4, the failure to consider mitigating evidence, or on issue 6, the withholding of exculpatory evidence. We therefore affirm the district court on these issues without further discussion.

[3] Florida law provides for a three-part process in capital cases. The first stage is the guilt phase. If a defendant is convicted of a capital crime, the prosecution and the defendant then present aggravating and mitigating evidence. After hearing the evidence, the jury makes a recommendation on

support the charge: 1) that Petitioner had committed premeditated murder against Officer Griffis and 2) a felony murder theory. The jury convicted Petitioner of first-degree murder and recommended the imposition of the death penalty. The trial court accepted the recommendation and sentenced Petitioner to death. On appeal, the Florida Supreme Court decided that insufficient evidence existed to prove beyond a reasonable doubt that Petitioner was the one who actually killed Officer Griffis (that is, that he was the "triggerman"). And the Florida Supreme Court decided the conviction on the basis of premeditation could not be sustained. Nevertheless, the court upheld the conviction on the basis of felony murder and the sentence. *See id.* at 1069.

Standard of Review

This petition for habeas corpus was filed on 3 February 1999, well after the effective date of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). Therefore, pursuant to 28 U.S.C. § 2254(d), a petition for a writ of habeas corpus can only be issued if the state court's ruling "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2); *see also Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 1518, 146 L.Ed.2d 389 (2000). Unless a state court decision is directly contrary to Supreme Court case law, we review state court findings of fact and conclusions of law for reasonableness. The district court's determination of whether this standard has been met is subject to a *de novo* review. *See Harrell v. Butterworth,* 251 F.3d 926,

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whether life imprisonment or execution is the proper punishment. Although it is entitled to "great weight," the jury's recommendation is not binding upon the trial court. Instead, the trial court conducts its own sentencing hearing and ultimately decides for itself whether the imposition of the death penalty is appropriate. *See* Fla. Stat. Ann. § 921.141(1)-(3); *Bolender v. Singletary,* 16 F.3d 1547, 1556 (11th Cir.1994).

930 (11th Cir.2001), *cert. denied,* --- U.S. ----, 122 S.Ct. 1367, 152 L.Ed.2d 360 (2002). A district court's findings of fact are reviewed for clear error. *See Nyland v. Moore,* 216 F.3d 1264, 1266 (11th Cir.2000).

I. Ineffective Assistance of Counsel at the Penalty Phase

Petitioner argues that his lawyer ("Counsel") provided ineffective assistance during the penalty phase of his trial. He contends that several omissions by Counsel rendered his assistance ineffective: 1) evidence that Petitioner suffered from a mental disorder; 2) evidence of Petitioner's life history; and 3) evidence that Petitioner was not the triggerman.

The standard for reviewing ineffective assistance claims was well- established when the Florida Supreme Court decided Petitioner's ineffectiveness arguments: a petitioner must show that his lawyer's performance fell below an "objective standard of reasonableness" and that the lawyer's deficient performance prejudiced the petitioner. *See Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Establishing these two elements is not easy: "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Waters v. Thomas,* 46 F.3d 1506, 1511 (11th Cir. 1995) (en banc)[4] (quoting *Rogers v. Zant,* 13 F.3d 384, 386 (11th Cir. 1994)).

For assessing a lawyer's performance, *Chandler v. United States,* 218 F.3d 1305 (11th Cir. 2000) (en banc) *cert. denied,* 531 U.S. 1204, 121 S.Ct. 1217, 149 L.Ed.2d 129 (2001), sets out the basic law: "Courts must indulge the strong presumption that counsel's performance was reasonable and

[4] We realize that—in the context of a habeas review of a state court's decision—only Supreme Court precedent can clearly establish the law. We cite Eleventh Circuit case law to demonstrate some applications of the relevant Supreme Court precedent that we believe are among the reasonable applications.

that counsel made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 1314 (internal marks omitted). This presumption of correctness applies when a petitioner is challenging his lawyer's act in not presenting certain mitigating evidence. *See Bolender v. Singletary,* 16 F.3d 1547, 1557 (11th Cir.1994) ("A lawyer's election not to present mitigating evidence is a tactical choice accorded a strong presumption of correctness which is *virtually unchallengeable.")* (emphasis added) (internal marks omitted). Our role in reviewing an ineffective assistance claim is not to "grade" a lawyer's performance; instead, we determine only whether a lawyer's performance was within "the wide range of professionally competent assistance." *See Strickland,* 104 S.Ct. at 2066.

The inquiry into whether a lawyer has provided effective assistance is an objective one: a petitioner must establish that no objectively competent lawyer would have taken the action that his lawyer did take. *See Chandler,* 218 F.3d at 1315. Because the standard is objective, Petitioner's argument that his counsel would have done more investigation if the trial court had granted a continuance between the guilt and penalty phases of the trial[5] and that his counsel, during a post-conviction evidentiary hearing, claimed to have been "caught with his pants down" in preparing for the penalty phase is not determinative. *See id.* at 1313 (stating that "lawyers, in every case, could have done something more"); *Tarver v. Hopper,* 169 F.3d 710, 716 (11th Cir.1999) (stating that lawyer's "admissions of deficient performance" were not persuasive).

A petitioner's burden of establishing that his lawyer's deficient performance prejudiced his case is also high. "It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually

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[5] This denial of a continuation does, however, raise other issues and will be discussed in Part II below.

every act or omission of counsel would meet that test." *Strickland,* 104 S.Ct. at 2067. Instead, a petitioner must establish that a reasonable probability exists that the outcome of the case would have been different if his lawyer had given adequate assistance. *See id.* at 2068.

A. Mental Health History

Petitioner argues that Counsel was deficient for failing to introduce evidence that Petitioner suffered from various disorders. Petitioner specifically claims that he suffers from "a serious thought disorder," and argues that the jury should have heard evidence of "multiple diagnoses of paranoid schizophrenia, [a] lengthy history of treatment with antipsychotic medications, the two admissions to the Florida State Hospital, and ... attempts at self harm." (Petition for Habeas Corpus at 24.) In addition, he claims to suffer from "a personality disorder with immature and dependent features." (Id.)

Petitioner cannot prevail on these claims. The Florida Supreme Court determined that Counsel "had clear tactical reasons" for not presenting mental health evidence. *See Van Poyck II,* 694 So.2d at 692. That determination and the conclusion that Counsel's performance therefore was not deficient are not unreasonable.

During a post-conviction evidentiary hearing, Counsel identified a number of reasons for not arguing Petitioner's mental health as a mitigating factor. First, Petitioner had spent most of his adult life in prison; and most evidence of Petitioner's mental health would have been based upon prison records. Counsel concluded that the use of such records would have opened the door to a considerable amount of damaging evidence: many disciplinary reports, weapons offenses, and escape attempts. Second, in discussions between Petitioner and Counsel before trial, Petitioner claimed to have faked many of

the episodes that led to his being sent to the Florida mental hospital.

These considerations give strong support to Counsel's decision not to present mental health evidence. First, a lawyer need not embrace his client's fraud. *See, e.g., Davis v. Singletary,* 119 F.3d 1471, 1475 (11th Cir.1997) (lawyer has "ethical duty not to present a defense based upon what he personally knew to be a lie"). And, the harm from the jury learning of these other factors could have outweighed the benefits of the evidence Petitioner now says should have been presented. A reasonable tactic, such as the one followed by Counsel, cannot form the basis for an ineffective assistance claim.

B. Life History

Petitioner also claims that Counsel's failure to present evidence of Petitioner's life history deprived him of the effective assistance of counsel. He specifically points to evidence of a difficult childhood, abuse at the hands of caretakers, and abuse suffered in juvenile prison. Petitioner identifies several additional witnesses who he says could have testified to the early death of Petitioner's mother, the emotional withdrawal of his father, physical abuse at the hands of a housekeeper, the fact that the Van Poyck children were looked after for a time by a mentally unstable aunt (Aunt Phyllis), and further abuse at the hands of Petitioner's stepmother (the father's second wife). Petitioner points to evidence of conditions Petitioner suffered at the Florida School for Boys at Okeechobee, where he was allegedly beaten and witnessed sexual abuse of other children.

In resolving this issue, the Florida Supreme Court concluded that "[e]vidence of [Petitioner's] life history was adequately presented by [Counsel]." *Van Poyck II,* 694 So.2d at 692. We accept that conclusion and the findings that support it; they are reasonable.

During the post-conviction evidentiary hearing, Counsel testified that he and Petitioner had discussed the penalty phase and the presentation of mitigating evidence "constantly." At the penalty phase hearing itself, Counsel called five witnesses. These witnesses testified to much of what Petitioner now claims Counsel failed to show the jury.

At trial, Jeff Van Poyck, Petitioner's brother, testified to their mother's early death, abuse from the housekeeper, and the strict discipline imposed by their stepmother. He also testified about how he had involved Petitioner in crime and in alcohol use at an early age. Petitioner's stepmother testified to the mental instability of Aunt Phyllis and to the negative influence Jeff had over Petitioner. Another aunt also testified to the mental instability of Aunt Phyllis. Finally, Counsel called a nurse who had met Petitioner while he was in prison. She testified that Van Poyck was a caring and friendly person and that he had expressed remorse over the death of Officer Griffis. Petitioner also testified on his own behalf. He testified to his close relationship with O'Brien, his educational pursuits in prison, and his regret of the death of Officer Griffis.

The presentation of life-history evidence at the trial satisfied the performance element of the *Strickland* test. That additional evidence might exist does not establish defective performance. It is well-settled in this Circuit that a petitioner cannot establish an ineffective assistance claim simply by pointing to additional evidence that could have been presented. *See Waters,* 46 F.3d at 1518.[6]

Moreover, the omission at trial of the specific evidence that Petitioner says should have been introduced was not so unreasonable as to give rise to a valid ineffective-assistance

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[6] We note what is well-established in this circuit because, if this circuit's law has developed in a certain way, we are hard-pressed to say that that development was unreasonable.

claim. The only non-cumulative, mitigating life history evidence[7] Petitioner identifies is abuse from his stepmother and abuse suffered in juvenile prison. The failure to present this evidence was not, however, ineffective assistance.

First, the additional evidence was not so powerful that every objectively reasonable lawyer who had the evidence would have used it. And, even if the evidence was that powerful, the evidence was not known to Counsel at the time of the penalty phase; and the failure to know of it was not the result of a constitutionally deficient investigation. Counsel and Petitioner talked "constantly" about potential mitigating evidence. During these conversations, the question of abuse was discussed "on a number of occasions," according to Counsel's post-conviction testimony. Petitioner stated that he did not think he had been abused as a child. Furthermore, Petitioner specifically denied that he was ever raped in prison and told Counsel that he generally got along fine in prison. Although Petitioner's experiences in the juvenile prison were never explicitly discussed, at no time during the many conversations Petitioner and Counsel had about potential mitigating factors did Petitioner suggest abuse in juvenile prison.

Information supplied by a petitioner is extremely important in determining whether a lawyer's performance is constitutionally adequate. In *Strickland,* the Supreme Court wrote "[c]ounsel's actions are usually based, *quite properly,* on informed strategic choices made by the defendant and on

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[7] As noted above, much of the additional evidence Petitioner says should have been presented was presented. *See Van Poyck II,* 694 So.2d at 692 ("[T]he jury was actually aware of most aspects of Van Poyck's life that he now argues should have been presented."). A petitioner cannot establish ineffective assistance by identifying additional evidence that could have been presented when that evidence is merely cumulative. *See Glock v. Moore,* 195 F.3d 625, 636 (11th Cir.1999) (finding that, "where much of the new evidence that [petitioner] presents is merely repetitive and cumulative to that which was presented at trial," petitioner could not show prejudice), *cert. denied,* 531 U.S. 890, 121 S.Ct. 213, 148 L.Ed.2d 150 (2000).

information supplied by the defendant." *Strickland,* 104 S.Ct. at 2066 (emphasis added). When a petitioner (or family members petitioner directs his lawyer to talk to) do not mention a history of physical abuse, a lawyer is not ineffective for failing to discover or to offer evidence of abuse as mitigation. *See Williams v. Head,* 185 F.3d 1223, 1237 (11th Cir.1999) ("An attorney does not render ineffective assistance by failing to discover and develop evidence of childhood abuse that his client does not mention to him."), *cert. denied,* 530 U.S. 1246, 120 S.Ct. 2696, 147 L.Ed.2d 967 (2000). Therefore, the Florida Supreme Court's rejection of this claim was not unreasonable.

C. Triggerman Evidence

Petitioner argues that Counsel's performance was constitutionally defective because he failed to present evidence that Petitioner was not the triggerman. He identifies two such pieces of evidence: that Valdes had blood on his clothes matching Officer Griffis' blood type, but that Petitioner did not; and that the murder weapon had been purchased by Valdes' girlfriend and that Valdes had been in possession of the gun when he and Petitioner left to commit the crime.

The Florida Supreme Court in its opinions has not discussed this particular ineffectiveness claim. The lack of words in the Florida Supreme Court opinions, however, does not lessen the deference that is to be given the Florida Supreme Court's rejection of Petitioner's contention: we still can only grant relief if the Florida Supreme Court's rejection of the claim was directly contrary to, or was an unreasonable application of, clearly established federal law. *See Wright v. Secretary for the Dept. of Corrections,* 278 F.3d 1245, 1253-56 (11th Cir.2002). We conclude that the Florida Supreme Court's decision on the issue was not unreasonable.

We—in this instance—do not discuss the performance element of ineffective assistance of counsel because we conclude that the Florida Supreme Court could have reasonably

concluded that no prejudice had been shown. A review of the penalty phase transcripts convinces us that Petitioner cannot establish that he was prejudiced by Counsel's failure to introduce this evidence. During the penalty phase, the witnesses called by the prosecutor only testified about Van Poyck's past crimes and about the fact that he was on parole when the instant offense was committed. The prosecutor did not present additional evidence suggesting that Petitioner was the triggerman.

Even more telling is the prosecutor's closing argument. Petitioner's being the triggerman played only a very minor role in the prosecutor's argument. As aggravating factors, the prosecutor advanced these things: 1) that Petitioner was on parole when the crime was committed; 2) that the crime was committed for the purposes of effectuating an escape from prison; 3) that Petitioner knowingly created a great risk of death to many persons; and 4) that Petitioner had previously been convicted of a violent felony. The establishment of these elements did not require arguing that Petitioner was the triggerman. The prosecutor never argued that it had been established beyond a reasonable doubt that Petitioner was the triggerman.

The only time the prosecutor did argue that the evidence tended to show that Petitioner was the triggerman was in rebutting Petitioner's argument that he was only an accomplice and played only a minor role in the crime.[8] Even in rebutting that argument, however, the prosecutor relied heavily on the idea that, "[r]egardless of who the triggerman is," death would still be appropriate. Rather than focusing the jury on who the triggerman was, the prosecutor stressed that Petitioner could not be considered a minor participant because he had been the one to come up with the idea of breaking O'Brien out of custody

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[8] Florida law provides that a mitigating circumstance exists where "[t]he defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor." Fla. Stat. Ann. § 921.141(6)(d).

and had planned the crime. While the prosecutor did, on a few occasions in his closing argument, say that evidence in the case suggested that Petitioner was the triggerman, the main argument made by the prosecutor was that the death penalty—because of the four aggravating factors and because Petitioner was not a minor participant in the underlying violent felony—was an appropriate sentence for Petitioner, regardless of who actually shot Officer Griffis.

Especially because the prosecutor's main argument was that the death penalty was appropriate regardless of who the triggerman was, we see no reasonable probability that, if Counsel had presented the additional evidence that Petitioner was not the triggerman, the outcome of the sentencing phase would have been different. The Florida Supreme Court could reasonably conclude that no prejudice existed. The Florida Supreme Court did reasonably conclude that the triggerman-evidence claim entitled Petitioner to no relief.

II. Denial of Continuance

Second, Petitioner argues that the trial court deprived him Due Process and his right to counsel and a particularized death sentence when the court failed to provide a continuance between the guilt and penalty phases of his trial. Petitioner claims that Counsel had relied upon the trial court's earlier promises to grant such a continuance and that Counsel had planned to conduct more extensive penalty phase investigations during the promised continuance. This claim is another one that is denied without discussion in the Florida Supreme Court's opinions. Giving the Florida Supreme Court's decision on this issue the proper deference, we conclude that the rejection of this claim was not unreasonable.

The decision of whether to grant a continuance is reserved to the sound discretion of the trial court. *See United States v. Bowe,* 221 F.3d 1183, 1189 (11th Cir.2000); *Gorby v. State,* 630 So.2d 544, 546 (Fla.1993). Furthermore, to establish

that a denial of a continuance was reversible error, a defendant must show that the denial caused "specific substantial prejudice." *United States v. Verderame,* 51 F.3d 249, 251 (11th Cir.1995); *see also Fennie v. State,* 648 So.2d 95, 97-98 (Fla.1994).

We agree with the district court that the Florida Supreme Court was not unreasonable in rejecting this claim, because the Florida Supreme Court could conclude that the trial court did not abuse its discretion in denying the motion for a continuance. This case is not one in which the trial court had been promising a continuance all along, only to pull the rug out from under Petitioner at the last minute. Nor is it a case in which a defendant has been brought to trial shortly after being charged and defendant has simply lacked sufficient time to prepare a defense. The only indication that the trial court ever promised a lengthy (1-3 week) continuance comes from the testimony of Petitioner's trial lawyers. This supposed promise, however, was made off the record. Furthermore, the promise stands in contrast to the record statements made by the trial court throughout the proceedings.

The district court in this case found that "[d]efense counsel were aware during the guilt phase that the penalty phase would commence virtually immediately after the guilt phase." (District Court Order at 21). Counsels' acts suggest that they knew the penalty phase would begin shortly after the guilt phase. The district court found many indications from the trial court to the Petitioner that only a short time between the guilt and penalty phase would be given. Moreover, at the end of the guilt phase, it was Counsel who insisted that the jury be "sequestered tonight in the event they have to come back tomorrow." The sequestration was made on the assumption that the jury would return the next day for sentencing, and Counsel made no indication that he objected to beginning the penalty phase the next day. The district court's finding that Petitioner's lawyers understood that little time would be given between the

guilt and penalty phases was not clearly erroneous.[9] Given those facts, the Florida Supreme Court could have reasonably concluded that the trial court did not abuse its discretion in denying the continuance. Therefore, the Florida Supreme Court's rejection of the claim based on the denial of a continuance was reasonable.

III. Ineffective Assistance on Direct Appeal

Petitioner further argues that he received ineffective assistance of counsel because his lawyer on direct appeal ("appellate counsel") failed to present properly a state law claim based on peremptory challenges to jurors. Under Florida law, "the general rule [is] that it is reversible error for a court to force a party to use peremptory challenges on persons who should have been excused for cause, provided the party subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and denied." *Cummings v. State,* 715 So.2d 944, 948 (Fla.1998).[10]

In this case, Petitioner identifies seven jurors who he says should have been dismissed for cause, but on whom he was forced to use peremptory challenges. To make out a claim like this one, a defendant, however, must also identify at least one juror who he wanted to challenge, but who he was forced to accept on the jury because he had run out of peremptory

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[9] In this case, we need not address the proper deference to give the implicit or unexpressed factual determinations made by the state court when it summarily denied this claim. Here, the state embraces the findings of the district court, so we will not decide whether federal courts are required to presume that the state courts, in rejecting Petitioner's claim, resolved all factual questions in the government's favor.

[10] We recognize that federal law does not require reversal where a defendant is forced to use a peremptory challenge on a juror who should have been dismissed for cause. *See Ross v. Oklahoma,* 487 U.S. 81, 108 S.Ct. 2273, 2278, 101 L.Ed.2d 80 (1988). Petitioner, however, is not claiming a direct violation of federal law with respect to jury composition. Instead, Petitioner is raising an ineffective assistance claim and arguing that he was prejudiced by his appellate lawyer's failure to assert properly a valid state-law claim.

challenges. The alleged lawyer error here is that appellate counsel named the wrong two jurors. While appellate counsel should have named jurors Moody and Bradford (who did, in fact, sit on the jury), he instead named jurors Bruschi and Abefarmis. Bruschi and Abefarmis had, however, been dismissed for other reasons. Therefore, the Florida Supreme Court ruled that petitioner's challenge to jury composition was "moot." *Van Poyck I,* 564 So.2d at 1070.

In denying Petitioner's state habeas corpus petition, the Florida Supreme Court rejected Petitioner's argument that appellate counsel was ineffective in presenting the jury-composition claim. In rejecting the ineffective-assistance-of-appellate-counsel claim, the Florida Supreme Court determined that Petitioner failed to establish the necessary prejudice: after reviewing the voir dire, the Florida Supreme Court wrote that "each of the seven persons repeatedly and unequivocally stated that he or she could render a verdict based solely on the evidence and the instructions given by the trial judge. We find nothing in this record that mandates that any of these venirepersons should have been excused for cause." *Van Poyck III,* 715 So.2d at 932-34.[11] We accept that conclusion; Petitioner has not met his heavy burden of showing that it is unreasonable, either in fact or in law.[12]

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[11] Although the Florida Supreme Court did not explicitly address the venire of Bradford and Moody, the district court did. The district court wrote that "both Moody and Bradford were appropriately on the jury." (District Court Order at 16.) For the reasons discussed below with respect to the other challenged jurors, we agree with that ruling.

[12] Petitioner argues that the Florida Supreme Court's statement on direct appeal that jurors Bruschi and Abefarmis should have been dismissed for cause required that court to hold, in the state habeas proceedings, that the jurors who are relevant to the claim should also have been dismissed for cause. This argument is without merit. The Florida Supreme Court's statement that jurors Bruschi and Abefarmis should have been dismissed for cause is only dicta, unnecessary to the decision. The Florida Supreme Court stated that the claim was "moot" because Bruschi and Abefarmis had been dismissed for other reasons. *See Van Poyck I,* 564 So.2d at 1070. The "law of the case" doctrine does not apply to dicta. *See Myers v. Atlantic Coast Line*

In *Morgan v. Illinois,* 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992), the Supreme Court wrote that a trial court must exclude "those biased persons on the venire who as jurors would unwaveringly impose death after a finding of guilt." *Id.* at 2232. And, a trial court has a duty to question (or allow questioning of) prospective jurors to ensure that a person who would automatically vote for the death penalty is disqualified. *See id.* at 2230- 31.

Critical to the resolution of this claim is the *Morgan* court's discussion of the kinds of questions that a defendant must be allowed to ask to allow the defendant to illustrate for the court which jurors were inalterably in favor of the death penalty. The extent of the *Morgan* court's holding on this issue is only that generalized "can you be fair?" and "can you follow the law?" questions are insufficient. *See id.* at 2233-34. The jurors in *Morgan* were never specifically asked whether they understood that "being fair" and "following the law" might mean returning a life verdict.

This case presents different facts. It is true that many of the challenged jurors expressed strong support for the death penalty; and some even initially suggested that, for certain crimes, they thought they would always return a death recommendation. Each juror, however, upon being instructed by the trial court on the law of Florida, not only said that he or she could be fair and follow the law, but also stated that he or she could return a life imprisonment recommendation if the facts and the law warranted it. In addition, each juror indicated, in response to questioning by the prosecution, that it would not be fair to defendants if juries returned a death recommendation in every case. We are aware of no Supreme Court case, and Petitioner has cited none, that has held that such a fact pattern

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R.R. Co., 112 So.2d 263, 267 n. 6 (Fla.1959); *see also Golden v. State,* 528 So.2d 50, 51 (Fla.Ct.App.1988) ("The doctrine of the law of the case applies only to issues actually or impliedly presented *and decided* on appeal, and not to mere dicta.") (emphasis added).

requires reversal. And, we do not consider the Florida Supreme Court's conclusion to have been an unreasonable application of *Morgan* or any other Supreme Court case decided before the Florida Supreme Court's decision.

IV. Consideration of Invalid Aggravating Factor

Petitioner also claims that the trial court committed error by considering, and allowing the jury to consider, that he was the triggerman. Error does exist where the sentencer relies upon an invalid factor. *See Mills v. Maryland,* 486 U.S. 367, 108 S.Ct. 1860, 1866, 100 L.Ed.2d 384 (1988). In this case, Petitioner argues that his being the triggerman was an invalid consideration because it is not supported by the evidence. In making this argument, Petitioner relies upon the Florida Supreme Court's ruling on his direct appeal, where the court ruled that insufficient evidence existed to prove that Van Poyck was the triggerman. *See Van Poyck I,* 564 So.2d at 1069.

As the Florida Supreme Court noted, however, another basis for the imposition of the death penalty existed: felony murder. The felony murder argument was supported by the evidence and is a sufficient basis for imposing the death penalty. *See id.* at 1070-71. The Florida Supreme Court's ruling sustaining the imposition of the death penalty was not unreasonable.

Where, as here, a jury is presented with two theories of the case, one supported by the evidence and the other not, we should presume that the jury relied on the supported theory. *See Sochor v. Florida,* 504 U.S. 527, 112 S.Ct. 2114, 2122, 119 L.Ed.2d 326 (1992). We have no good reason to think that the jury relied on something more than the factually supported theory of felony murder. Petitioner points to the jury's verdict form from the *guilt* phase of the trial, which indicates that at least one—but not all—of the jurors would have convicted Petitioner on the basis of premeditated murder. The question,

however, is what the jury considered at the penalty phase of the trial.

In deciding this question, it seems useful to look at the closing arguments made during the penalty phase. As discussed above, whether Petitioner was actually the triggerman was of only minimal importance during the prosecutor's closing. Never did the prosecutor argue triggerman status as an aggravating factor that would justify the death penalty. And, in rebutting Petitioner's argument that Petitioner's minor role in the crime should be considered a mitigating factor, the prosecutor focused chiefly on Petitioner's role in orchestrating and planning the crime, not on whether Petitioner was the triggerman. The prosecutor's expressed argument was that Petitioner deserved death whether or not Petitioner was the triggerman.

Petitioner also argues that the trial court improperly relied upon his being the triggerman. Again, the Florida Supreme Court's rejection of these claims was not unreasonable.

The sole indicator that the trial court considered Petitioner to be the triggerman is a passage in the order imposing the death penalty, in which the trial court stated "the State clearly presented competent and substantial evidence as to the crime of first degree felony murder and/or first degree premeditated murder and in reality presented competent evidence that [Petitioner] may have in fact been the individual who pulled the trigger and shot Fred Griffis." The trial court never stated that it found Petitioner, in fact, to have been the triggerman or that the court considered Petitioner's triggerman status to be an aggravating factor justifying the death penalty. The only aggravating factors the trial court found to exist were the four argued by the prosecutor in his closing, and none of those factors is based upon triggerman status.

In arguing that the trial court's alleged error requires reversal of the death penalty, Petitioner relies heavily on our decision in *Delap v. Dugger,* 890 F.2d 285 (11th Cir.1989). In *Delap,* the trial court at defendant's first trial had rendered a judgment of acquittal on a charge of felony murder. Then at the sentencing phase of the defendant's retrial (at which he had been convicted of premeditated murder), the court had imposed a death sentence. The trial court explicitly relied on the specific statutory factor that the murder occurred during the commission of a felony. *See Delap,* 890 F.2d at 307. The elements and burden of proof for felony murder as a basis for conviction and for "murder in the course of a felony" as an aggravating factor were almost identical. We declared that the imposition of the death penalty on such a basis violated the double jeopardy clause. *See id.* at 317-19.

Here, the facts are significantly different.[13] The prosecutor did not argue triggerman status as an aggravating factor. And in listing the aggravating factors it had determined to be present, the trial court only listed the four factors argued by the prosecutor; triggerman status was not mentioned as an aggravating factor. That the trial court concluded that the prosecution had "presented competent evidence that [Petitioner] may have in fact been the individual who pulled the trigger and shot Fred Griffis" does not mean that the trial court had found, beyond a reasonable doubt, that Petitioner was the triggerman. And, it certainly does not mean that the trial court relied upon Petitioner's role as triggerman as some kind of aggravating factor. As such, the rule of *Delap* has not been violated, and Petitioner has made no showing that the Florida Supreme Court's rejection of his claim was unreasonable. Petitioner's

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[13] We again stress that, even if the underlying facts of *Delap* were identical to the underlying facts of this case, Petitioner would still not necessarily prevail. Petitioner's burden is to show that the Florida Supreme Court's opinion was an unreasonable application of federal law according to the United States Supreme Court. Reasonable judges can disagree on the proper interpretation of the United States Supreme Court's precedents; a state court ruling that is contrary to Eleventh Circuit law might still be a reasonable application of Supreme Court precedent.

petition for a writ of habeas corpus on this ground must therefore be denied.

Based upon the above considerations, we conclude that the district court's denial of a writ of habeas corpus was proper. The judgment of the district court is affirmed.

AFFIRMED.

290 F.3d 1318, 2002 WL 944016 (11th Cir.(Fla.)), 15 Fla. L. Weekly Fed. C 555

APPENDIX C

SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK,
Petitioner,

v. No. 89870

HARRY K. SINGLETARY, Jr., etc.,
Respondent.

[May 14, 1998]
Rehearing Denied Aug. 7, 1998.

PER CURIAM:

William Van Poyck, a prisoner under sentence of death, petitions this Court for a writ of habeas corpus. We have jurisdiction pursuant to article V, section 3(b)(9), Florida Constitution, and find that Van Poyck is not entitled to relief.

On June 24, 1987, Van Poyck was arrested following an attempt to free prison inmate James O'Brien from the custody of two corrections officers. Officer Fred Griffis was shot and killed during the commission of the crime. Van Poyck was found guilty of first-degree murder, attempted first-degree murder, six counts of attempted manslaughter, armed robbery with a firearm, aggravated assault, and aiding in an attempted escape. The jury recommended death by a vote of eleven to one and the trial judge sentenced Van Poyck to death. The facts of the case are set forth in greater detail in *Van Poyck v. State,* 564 So.2d 1066 (Fla.1990), *cert. denied,* 499 U.S. 932, 111 S.Ct. 1339, 113 L.Ed.2d 270 (1991), in which this Court affirmed the convictions and death sentence. Van Poyck subsequently filed a motion for post conviction relief under Florida Rule of Criminal Procedure 3.850. The trial court denied relief after a

substantial evidentiary hearing. This Court recently affirmed the trial court's ruling on the rule 3.850 motion in *Van Poyck v. State,* 694 So.2d 686 (Fla.1997). Van Poyck now files this petition for a writ of habeas corpus claiming that: (1) his appellate counsel was ineffective for failing to properly raise the issue of the trial court's wrongfully forcing him to exhaust his peremptory challenges; (2) his death sentence is unconstitutional because the judge and jury weighed the invalid aggravators that the murder was premeditated or that Van Poyck was the shooter; and (3) he was charged with and convicted of criminal offenses that did not exist as a matter of law. Issues one and three warrant discussion. Issue two is procedurally barred.[14]

As to his first issue, Van Poyck claims the trial judge wrongfully forced him to exhaust his peremptory challenges on seven venirepersons who should have been dismissed for cause, then erroneously denied his request for an additional peremptory challenge.[15] Van Poyck asserts that as a result of the trial judge's error, two challenged jurors served on the jury.[16] Van Poyck contends that his appellate counsel on direct

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[14] This claim was raised and rejected on direct appeal, *Van Poyck,* 564 So.2d at 1070-71, and also rejected as procedurally barred on the rule 3.850 appeal. *Van Poyck,* 694 So.2d at 698.

[15] The trial judge offered to grant defense counsel's request for an additional peremptory challenge on the condition that Van Poyck waive his right to examine a venireman that the judge wanted to excuse for cause. Apparently, the judge wanted this juror excused because he was concerned about the juror's competency. The trial judge admitted "that the Appellate Court won't like [the proposed bargain]." Defense counsel refused the offer and the trial judge denied his request for an additional peremptory challenge. We do not condone the trial judge's proposed "bargain." Counsel for both the prosecution and the defense have a due process right and a right under Florida Rule of Criminal Procedure 3.300(b) to examine venirepersons. *O'Connell v. State,* 480 So.2d 1284 (Fla.1985).

[16] The issue was not preserved for direct appeal as to one of these jurors because Van Poyck's trial counsel did not identify her as a venireperson whom he wanted to excuse through an additional peremptory challenge. *Kearse v. State,* 662 So.2d 677, 683 (Fla.1995). Thus, Van Poyck's appellate

appeal compounded the error by failing to properly present the issue because he identified the wrong jurors seated on the jury, and then failed to argue the issue in any depth or cite relevant legal authority. Van Poyck states that this Court appropriately rejected the argument because the jurors identified by his appellate counsel, although unsuccessfully challenged for cause, were subsequently dismissed for personal reasons, and thus it was unnecessary for Van Poyck to exercise peremptory challenges. Van Poyck claims that his appellate counsel's deficient performance was prejudicial because this Court would have granted a new trial had the issue been properly presented. We do not agree that the trial court wrongfully forced Van Poyck to exhaust his peremptory challenges or that Van Poyck's appellate counsel rendered ineffective assistance.

If a reasonable doubt exists as to whether a juror can possess an impartial state of mind in the discharge of his or her duties, that juror is incompetent to serve and must be excused for cause. *Hill v. State,* 477 So.2d 553, 556 (Fla.1985). A trial judge has great discretion in ruling on challenges for cause based on juror incompetency, *Gore v. State,* 706 So.2d 1328, 1332-33 (Fla.1997), and we will not overturn the trial judge's determination in the absence of "manifest error." *Smith v. State,* 699 So.2d 629, 636 (Fla.1997). The denial of a challenge for cause will be upheld if there is competent record support for the decision. *Gore,* 706 So.2d at 1332-33; *Johnson v. State,* 660 So.2d 637, 644 (Fla.1995). On the other hand, it is reversible error when a challenge for cause is improperly denied, and the defendant then exhausts his peremptory challenges on venirepersons who should have been dismissed for cause and a request for additional peremptory challenges is denied. *Trotter v. State,* 576 So.2d 691, 693 (Fla.1990); *Moore v. State,* 525 So.2d 870, 873 (Fla.1988); *Hill v. State,* 477 So.2d 553, 556 (Fla.1985).

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counsel was not ineffective for failing to raise this procedurally barred claim.

Based on our examination of the record, we find that the trial judge was clearly within his discretionary authority in denying the challenges for cause to the seven venirepersons now claimed by Van Poyck to have been biased or prejudiced. During individual voir dire, each of the seven persons repeatedly and unequivocally stated that he or she could render a verdict based solely on the evidence and the instructions given by the trial judge.[17] We find nothing in this record that

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[17] The following are excerpts from voir dire of the seven venirepersons:

Q [The Court]: Would you say ... that you could sit on a jury and if a person is found guilty or first degree murder, listen to the evidence in the penalty phase, listen to the instructions in the law and make a recommendation to me and follow the instructions and the law, make a recommendation about either life in prison or death or do you think you would always recommend death?

A [Juror A]: I don't think I would always recommend death. It would depend on the facts and the law.

....

Q: [W]ould [you] be willing and able to recommend life if the law [sic] met the requirements of the law?

A: Yes, sir.

....

Q [The State]: And it would not be fair to the Defendant if a jury were to automatically recommend death in every case?

A: I agree.

Q: So, even in a case where there is an intentional killing of a prison guard, could you still look at all the surrounding facts and circumstances such as this person's involvement, any aggravating factors, any mitigating factors that you are instructed to by the Court before making that recommendation?

A: I would be willing to listen to all the factors. ....

Q: Would you make up your decision of guilt or innocence based upon the evidence that you hear in the courtroom where you get an opportunity to see the witnesses, hear what they have to say, hear the cross examination, see if the evidence conflicts or is consistent with the other evidence in the case?

A: I would have to do that.

Q: That's where a person's guilt or innocence should be based upon, the actual witnesses with confrontation and cross examination, you agree with that?

A: Yes.

Q: That's what you would do in this case?

A: Yes.

....

Q [The Court]: If I instructed you that under the laws of our country, that under the constitution Mr. Van Poyck as he sits here right at this moment is presumed innocent and that presumption stays with him until the time the State presents evidence sufficient for you to find him guilty beyond a reasonable doubt, would you be able to follow that instruction?

A: I would hope that I could.

Q: Okay. If I told you right now the ball is in your court, is Mr. Van Poyck guilty or not guilty, what would you say in light of what I just told you?

A: I would have to say not guilty.

....

Q [The Court]: Under the law of Florida the death penalty is an appropriate sentence only in very special cases. And I am going to instruct you on the law as to, basically, what those aggravating circumstances and what mitigating circumstances are. Would you follow those instructions?

A [Juror B]: (Nods in the affirmative.)

Q: And disregard your personal opinion on the matter?

A: (Nods in the affirmative.)

....

Q: Would you follow my instructions and agree that not in all cases a person should get a death penalty?

A: I will follow your instructions.

Q: No matter what they are?

A: No matter what they are.

....

Q: [Van Poyck] has no burden of proof under the law. He is not required to prove anything in a criminal case, only the State is required to prove anything; okay?

A: (Nods in the affirmative.)

Q: You understand that?

A: (Nods in the affirmative.)

Q: Do you agree with that one principle of law?

A: Yes.

....

Q [The Court]: Under the law of Florida, sir, the death penalty is a penalty that is appropriate only in very specific and limited cases. And you will be instructed in the law as to what to consider in regards to the aggravating and mitigating circumstances. You must follow the law. Do you understand that?

A [Juror C.]: Yes.

Q: Could you follow that law irregardless of your personal feelings?

A: Yes.

Q: Could you perceive a case where an individual would be on a jury and you would hear the aggravating, mitigating circumstances and you would vote a recommendation of life in prison?
A: Yes.

....

Q: All right, would you agree, sir, that the matter, matter of employment of the alleged dead person being a ... law enforcement officer ... would not affect your ability to render a fair recommendation as to life or death?
A: It would not.

....

Q: Sir, would you say even though you feel [death] is the appropriate penalty [in cases of premeditated first-degree murder] ... does that mean that it is a penalty that you would vote for in every first degree murder case regardless, you would not pay attention to the evidence or the instructions or would you follow them?
A: I would listen and think about it and weigh all the evidence and make my decision on that. I would not go in straight looking at: Well, it's premeditated.
Q: It's not a closed issue then, to you?
A: Right. I am not—I would have to have an open mind about it.
Q: You will follow my instructions that I tell you?
A: Yes, sir.

....

Q [The Court]: Could you, sir, sit on the jury, listen to the instructions of the law and the evidence and render a verdict based on the instructions on the law and the evidence and disregard your personal feelings? A [Juror. F.]: I, gee, I would have to.
Q: Okay. In other words, if you sat on the jury you could conceive where you would sit on the jury, listen to the evidence and the instructions on the law and come back and say based on everything I have heard there should be a recommendation of life. You could do that?
A: I can do that.

....

Q: The death penalty should not be imposed in all cases; is that a fair statement?
A: Yes.

....

Q[The State]: Sir, even though it's a police officer that was, or a prison guard that was killed in this case, would you listen to the mitigating factors?
A: I would listen to the mitigating factors.
Q: [W]ould you listen to the instructions of the Court?
A: Yes.

Q: Would you weigh any mitigating factors against the legal aggravating factors the Court would instruct you?
A: That would be my job.
Q: Concerning that [pretrial] publicity, even though you have read the papers, you formed an opinion from that, could you set that aside and reach a decision based upon the law and the evidence?
A: I feel that I would, yes. I am intelligent enough to go on what is said, what is done in the courtroom.
....
Q [The Court]: Could you perceive of a situation, excuse me, where you could be on a jury and hear the aggravating and mitigating circumstances and the instructions on the law and you could return a recommendation of, personally, of life in prison?
A [Juror M.]: Yes, if it was explained or, you know, like I said, it was the law.
Q: Okay, what you're telling me then, what I believe is you would be willing to listen to the evidence and aggravating factors, evidence of mitigating factors, you would follow the law that I give you or instructions, make your recommendation based on those factors?
A: Yes.
Q: You would follow that law whether you personally agreed with it or not?
A: Yes.
....
Q [The State]: If there are aggravating factors that exist outweighing the mitigating factors, then you should make a recommendation of life. Could you follow those instructions of the Court and be fair to both sides?
A: Yes.
Q: So, you would not automatically just because a person is convicted of first degree murder, you would not automatically recommend death. You would look at the circumstances and the Defendant's background or what have you and look at all the circumstances?
A: The facts and the circumstances.
Q: Listen to the judge and make a reasoned decision?
A: Yes.
....
Q [The Defense]: Suppose the judge should instruct you premeditated murder, even though it's no question but that the person did it, that it is not the end. There are other things that need to be considered. Would you have a problem putting aside your feelings about the death penalty and about those people, you know, living off the public coffers, for the rest of their lives, would you have a problem putting that stuff aside and considering the other things that would need to be considered?

A: No, because the judge, if he says that's the law or that's the way it should be, then, you know, that's his decision, you know. I can live with it.
Q: Would you have any problems going home and telling your family members or your friends that you returned a life recommendation in a premeditated murder case?
A: No.

....

Q [The Court]: [C]ould you personally sit on a jury where a person was convicted of first degree murder, hearing the aggravating and mitigating circumstances and instructions on the law and follow those instructions on the law whether you personally agree with them or not?
A [Juror M.]: Yes, I believe I could.

....

Q: Could you vote a recommendation of life if the law warranted that, whether you personally agreed or not?
A: Yes, I would, sir.

....

Q: Ma'am, let me ask you one question. If you were on a jury and you went to the penalty phase and I gave you an instruction in the law as to what concerns the penalty phase and your recommendation, would you follow that instruction in the law?
A: Yes.
Q: Whether you personally agree with it or not?
A: Yes, I would follow the instructions of the law. Q: Say it involved a police officer or a prison guard and you have those strong feelings about them that you mentioned. Would you still follow those instructions in the law?
A: If I took the oath and all that, yes, I would follow the instructions. I would put my own emotions aside, try not to make up my mind until after I have heard the instructions. But I would follow the instructions. That's the way it would be. That's the way it would have to be because I believe in the law.

....

Q [The Court]: Will you be willing, sir, to look at [the case] from an objective viewpoint? You understand that under our law the death penalty is only a sentence imposed in specific cases? Would you be willing to follow our law when it was given to you in regards to that extent?
A [Juror N.]: Yes.
Q: And you have specific instructions on the law as to when you make a recommendation as to death or life. Would you be willing to follow those?
A: Yes.

mandates that any of these venirepersons should have been excused for cause.

Van Poyck notes that this Court decided in his direct appeal that the two jurors incorrectly named by his appellate counsel had a pro-death bias and should have been struck for cause. *Van Poyck,* 564 So.2d at 1071. He claims that because the voir dire testimonies of these jurors are indistinguishable in content from the voir dire of various venirepersons whom his appellate counsel should have named, this Court would have found reversible error in the denial of the for-cause challenges and in the denial of his request for an additional peremptory challenge had he received effective assistance of counsel on appeal. We have reexamined the voir dire of the jurors who were challenged for cause and were the subject of a claim in the initial appeal. In their voir dire, they each unequivocally indicated that they would abide by the trial court's instructions and would recommend a life sentence if the mitigating circumstances outweighed the aggravating circumstances.[18]

....

Q [The State]: Could you make a decision if you're chosen as a member of this panel based upon what the judge tells you, do you think you could give that Defendant a fair trial?

A: Yes, I would have to follow the law, yes.

[18] The following are excerpts from the voir dire of these venirepersons:

Q [The Court]: Will you follow my instructions on the law if they were to tell you that the death penalty is limited and a recommendation only of death can only be given in specific instances where certain aggravating factors outweigh any mitigating circumstances?

A [Juror AA]: Uh-huh.

....

Q: Would you say that it's not fair for a jury to always recommend the death penalty, would you agree with that, a jury should not always recommend death?

A: Yes, I think I do.

....

Q [Defense Counsel]: [D]o you still feel, however, that whatever instructions there are that in all cases where there is an intentional killing you believe that the death penalty should be given?

A: No, not all cases.

Since they were excused for personal reasons and Van Poyck did not have to exercise a peremptory challenge, the grounds for their excusal for cause was a non-issue in the initial appeal. On a reexamination of the record, we also find that the trial judge properly exercised his discretion in denying the challenge for cause to each of these jurors.

In conclusion, we find that Van Poyck's appellate counsel did not render ineffective assistance for failing to pursue and argue Van Poyck's claim that the other seven venirepersons were biased or prejudiced. *See Williamson v. Dugger,* 651 So.2d 84, 86 (Fla.1994); *Chandler v. Dugger,* 634 So.2d 1066, 1068 (Fla.1994).

In his third issue, Van Poyck claims that he was charged with and convicted of crimes that do not exist as a matter of law. Specifically, Van Poyck contends that his convictions for attempted first-degree murder and attempted manslaughter were based on a felony murder theory, and that attempted felony murder was determined in *State v. Gray,* 654 So.2d 552 (Fla.1995), to be a legal impossibility. This claim is also without merit. In *State v. Woodley,* 695 So.2d 297 (Fla.1997), this Court clarified that the *Gray* decision should not be applied retroactively to overturn a conviction of attempted felony murder that has become final on appeal. Because the crime of attempted felony murder was a valid offense when Van Poyck's convictions became final, he is not entitled to the relief requested.

....

Q [The Court]: [U]nder our system of justice Mr. Van Poyck, as he is seated here, is presumed innocent.... Do you agree with that?

A [Juror DB]: Yes, I do. ....

Q: Would you agree that you could sit as a juror in a case of this nature of first degree murder and if you listened to the aggravating and mitigating circumstances that you would follow my instructions on the law disregarding your personal feelings?

A: Yes, I would.

Accordingly, the petition for a writ of habeas corpus is denied.

It is so ordered.

OVERTON, HARDING and WELLS, JJ., and GRIMES, Senior Justice, concur.

ANSTEAD, J., concurs in part and dissents in part with an opinion, in which KOGAN, C.J. and SHAW, J., concur.

ANSTEAD, Justice, concurring in part and dissenting in part.

The majority's holding on the juror challenge issue is not only contrary to this Court's prior unanimous opinion in this case, but is also erroneously based solely on the faulty premise that "each of the seven persons [challenged for cause] repeatedly and unequivocally stated that he or she could render a verdict based solely on the evidence and the instruction given by the trial judge." Majority op. at 932. This simplistic analysis and conclusion that a juror becomes immune to challenge as long as a juror will answer the right leading question is directly contrary to our established law. *See Bryant v. State,* 656 So.2d 426, 428 (Fla.1995); *Hill v. State,* 477 So.2d 553, 555 (Fla.1985); *Singer v. State,* 109 So.2d 7 (Fla.1959). These cases make clear that there is no particular question that can be asked nor answer received that will serve as a magic wand to qualify an otherwise objectionable juror.

The majority cites *Hill* but fails to apply its essential holding that where "any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause." *Hill,* 477 So.2d at 556. A recent opinion by Judge Pariente for the Fourth District Court of Appeal relying on our established law demonstrates the flaw in the majority's analysis and conclusion. Writing in *Williams v.*

State, 638 So.2d 976 (Fla. 4th DCA 1994), Judge Pariente correctly analyzed this same issue:

> A juror's subsequent statement that he or she could be fair should not necessarily control the decision to excuse a juror for cause, when the juror has expressed genuine reservations about his or her preconceived opinions or attitudes. Reasonable doubt has been found where a juror admitted she "probably" would be prejudiced, even though she then asserted she "probably" could follow the judge's instructions.
>
> It was only after the court asked a series of questions, which included leading questions, that this juror asserted his belief that he hoped he could be fair and impartial. A "juror who is being asked leading questions [by the court] is more likely to 'please' the judge and give the rather obvious answers indicated by the leading questions...." Thus, the juror's responses to questioning by the court must be evaluated in light of this reality.

Id. at 979 (alteration in original) (citations omitted) (quoting *Price v. State,* 538 So.2d 486, 489 (Fla. 3d DCA 1989)). In *Hill,* we emphasized, in much the same way Judge Pariente did in *Williams,* that "the 'statement of a juror that he can readily render a verdict according to the evidence, notwithstanding an opinion entertained, will not alone render him competent if it otherwise appears that his formed opinion is of such a fixed and settled nature as not readily to yield to the evidence.' " 477 So.2d at 555-56 (quoting our seminal opinion *Singer v. State,* 109 So.2d at 22).

Trial and appellate courts must be diligent in distinguishing between those responses merely reflecting some understandable confusion with the intricacies of the criminal law, and those responses which equivocally cast doubt as to that juror's ability to render an impartial and unbiased decision or

recommendation as to the appropriate sentence in a particular case. Thus, "[i]n evaluating a juror's qualifications, the trial judge should evaluate all of the questions and answers posed to or received from the juror." *Parker v. State,* 641 So.2d 369, 373 (Fla.1994). Thereafter, where " 'any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause.' " *Bryant,* 656 So.2d at 428 (quoting *Hill,* 477 So.2d at 556); *see also Singer; Williams,* 638 So.2d at 978 ("Because impartiality of the finders of fact is an absolute prerequisite to our system of justice, we have adhered to the proposition that close cases involving challenges to the impartiality of potential jurors should be resolved in favor of excusing the juror rather than leaving doubt as to impartiality.").

Under this well-established standard of "reasonable doubt," the relevant inquiry is not whether the juror simply agrees to follow the law as instructed by the court, but whether the juror has demonstrated by her responses to all inquiries that she has an open mind on the issues being tried and can ultimately consider the evidence presented and render an unbiased decision. *See Lusk; see also Ferrell v. State,* 697 So.2d 198, 198 (Fla. 2d DCA 1997) (reversing defendant's conviction where juror should have been excused because his reluctance to consider voluntary intoxication defense raised reasonable doubt as to ability to render impartial verdict). An examination of the record here demonstrates that several death penalty qualified jurors should have been excused for cause.

Challenges On Appeal

For example, here, venire persons Busto, Carter, Farmer, and Moker initially indicated strong support for the death penalty or expressed a predisposed belief that premeditated murder or the murder of a law enforcement officer automatically warranted the death penalty. Upon further questioning by the court or the attorneys, however, each clearly

stated that their recommendation would depend on the actual circumstances presented in the case, and they would not automatically vote in favor of the death penalty. I find that the trial court and prosecutors sufficiently rehabilitated those jurors through additional questioning and further explanation of the jury's role in criminal proceedings. Therefore, I agree with the majority that there was no error in their selection.

Aldridge, Nickerson and Miller

In contrast, however, and left unexplained by the majority, venire persons Aldridge, Nickerson and Miller each indicated biases or prejudices as to Van Poyck's guilt or a predisposition in favor of the death penalty for him, which clearly cast reasonable doubt on their impartiality. For example, Miller responded during the selection process:

> THE COURT: ... If you were asked your opinion of the death penalty, sir, would you say you are strongly in favor, strongly opposed or in the middle?
> MR. MILLER: I am for capital punishment.
> THE COURT: Okay, would you agree, sir, that it is a fair statement that capital punishment or the death penalty is not an appropriate sentence in all first degree murder cases, that it depends on the case?
> MR. MILLER: Right. The thing, if a person is without a doubt proven guilty, you know, for a rape or murder, I believe, you know, death ought to be the sentence.
> THE COURT: In every case no matter what?
> MR. MILLER: Without a doubt, yes, if it's proved without a doubt.
>
> After additional questions by the prosecutor and defense counsel, the following colloquy occurred:
>
> MR. KLEIN [Defense Counsel]: Is there any particular type of case where you would have severe problems or substantial problems with giving a life recommendation? How about premeditated murder, would you have a problem giving a life

recommendation for premeditated murder assuming, again, the facts show there is no question that he did it beyond a reasonable doubt?
MR. MILLER: Yes, premeditated I would say it was deliberate so long as it was without a doubt, I would probably, you know, go with the death penalty. ....
MR. KLEIN: Would you feel the same way if you were to know that the alternative to the death penalty that a person should spend the rest of his life in prison, you as a taxpayer would have to house and feed him for the rest of his natural life, would you, would you hesitate to give a life recommendation under those circumstances?
MR. MILLER: Yes.

He further stated that he did not believe the public should be burdened with the cost of feeding and housing persons convicted of premeditated murder. Although the majority notes Mr. Miller's later statements in response to leading questions that he could set his personal feelings aside and follow the court's instructions, his initial statements strongly cast doubt on his ability to remain impartial and, under our established case law, it was error for the trial court to deny a challenge for cause.

Similarly, Aldridge's statements indicated reasonable doubt as to his ability to accept Van Poyck as innocent until proven guilty:

MR. KLEIN: Mr. Aldridge, as a result of what you have read [in the newspapers], have you formed any opinion, at all, about this case or about Mr. Van Poyck?
ALDRIDGE: Based on the facts presented in the newspaper, my opinion is that the Defendant is guilty.
MR. KLEIN: Okay. Based upon what you read, would you have, would you, before you could bring back a verdict of not guilty, would you ask for evidence, would you ask for us as Defense to present evidence to persuade you otherwise?

MR. ALDRIDGE: Yes, certainly.
MR. KLEIN: Would you have a difficult time finding Mr. Van Poyck not guilty unless you heard some evidence from the Defense to convince you that he was innocent in view of what you have heard?
MR. ALDRIDGE: Yes, in view of what I have read, yes.
THE COURT: Mr. Aldridge, let me ask you something. If I instructed you that under the law of our country, that under the constitution Mr. Van Poyck as he sits here right at this moment is presumed innocent and that presumption stays with him until the time the State presents evidence sufficient for you to find him guilty beyond a reasonable doubt, would you be able to follow that instruction?
MR. ALDRIDGE: I would hope that I could.
THE COURT: If I told you right now the ball is in your court, is Mr. Van Poyck guilty or not guilty, what would you say in light of what I just told you?
MR. ALDRIDGE: I would have to say not guilty.
THE COURT: Okay. Would you be able to follow that if you were a juror and not form an opinion or fixed in your mind a verdict until you have heard all the evidence in the courtroom?
MR. ALDRIDGE: *I would hope that I* could.
....
THE COURT: Also, under our system the Defendant in any criminal case is not required to testify nor present evidence. The reason for that is that the burden of proof in a criminal case is on the State, not on the Defense. Would you agree with that?
MR. ALDRIDGE: Yes.
THE COURT: Would you be able to do that even if you read the papers?
MR. ALDRIDGE: I *would hope that I could.*
(Emphasis added.)

Aldridge's statements that he hoped he could set aside his personal views and render a verdict based solely on evidence presented in the courtroom did not overcome his earlier statement that he believed Van Poyck was guilty. Rather, his responses, "I hope that I could" to each of the court's questions pertaining to the guilt phase of the trial further clouded Aldridge's ability to set aside his personal biases. *Williams; Singer.*

Nickerson also declared strong support for the death penalty and expressed a predisposed belief that premeditated murder warrants the death penalty. Upon being advised by the court that, if selected as a juror, he would be given a set of instructions to follow in making a recommendation as to sentence, Nickerson claimed that he "probably would" follow the instructions regardless of his personal views, but "d[id] not know for sure."

When compared to the juror responses discussed in our prior cases and those discussed by Judge Pariente in *Williams,* it is clear that Nickerson, Miller and Aldridge should have been excused for cause because their responses raised reasonable doubts as to their ability to render an unbiased and impartial decision and recommendation. Despite their affirmations to the court, Nickerson's response that he "probably would" follow the law and Aldridge's statement that he "hoped [he] could" are, for example, far too uncertain and ambiguous to overcome their earlier statements indicating predisposed prejudices. Our case law supports appellant's challenges to these jurors. Because the trial court denied Van Poyck's challenges for cause, Van Poyck was forced to exhaust his peremptory strikes on them. As a result, two pro-death jurors actually sat on his jury.

Prior Appeal

Van Poyck contends that the trial court's error was compounded on direct appeal when his appellate attorney raised

the juror qualification issue but identified the wrong two jurors, Bruschi and Abufaris, as objectionable. Appellate counsel's performance was patently incompetent, since Bruschi and Abufaris had both been excused from jury service for other reasons, thereby rendering any trial court error on challenges to them entirely moot. Nonetheless, based upon our established case law discussed above, this Court *unanimously* held in Van Poyck's first appeal that had jurors Bruschi and Abufaris not been released from jury service for other, personal reasons, the trial court would clearly have been in error in failing to excuse them for cause based on their responses to questions during the jury selection process. *Van Poyck v. State,* 564 So.2d 1066, 1071 (Fla.1990).

Understandably, the appellant compared the responses of Bruschi and Abufaris to the responses of the other jurors he challenged for cause, now having the benefit of this Court's opinion as to the kind of responses that would disqualify a juror. Today, however, the majority opinion pulls the rug out from under the appellant by abruptly receding from our prior unanimous conclusion as to jurors Bruschi and Abufaris. Majority op. at 934. And, of course, this abrupt about-face is done with absolutely no analysis other than the fact that today's majority disagrees with our prior unanimous opinion. Kind of scary, isn't it?

Contrary to the present majority's posture, an examination of the record demonstrates that our prior opinion was correct in concluding that both Abufaris and Bruschi indicated predisposed beliefs that premeditated murder automatically warrants the death penalty, which tainted those jurors' later affirmations to the court that they would follow the law. For example, Bruschi made the following statements during voir dire:

> THE COURT: ... Would you agree that you could sit as a juror in a case of this nature of first degree murder and if you listened to the aggravating and mitigating

circumstances that you would follow my instruction on the law disregarding your personal feelings?
MR. BRUSCHI: Yes, I would.
THE COURT: Would you agree that first degree murder is not the appropriate penalty—that death is not the appropriate penalty in all first degree murder cases?
MR. BRUSCHI: Agree that it is.
THE COURT: You think it is for all cases?
MR. BRUSCHI: For all, for murder.
THE COURT: Okay, what if I told you under Florida law it is not an appropriate penalty for all cases of first degree murder, only in certain cases?
MR. BRUSCHI: It's hard because technically what I believe in, murder is basically punishable by death.
THE COURT: Okay. Would you agree, though, that you would put that feeling aside and render a recommendation of a sentence in this case based on the instructions in the law I give you?
MR. BRUSCHI: Yes, it would.

Upon additional questioning by defense counsel, however, Mr. Bruschi indicated that premeditated murder warrants the death penalty:

MR. KLEIN: Let's go back to premeditated murder if I could. Do you think somebody who committed premeditated murder doesn't deserve to live?
MR. BRUSCHI: Yes, I do. I would agree with that.
MR. KLEIN: How strongly do you feel about that, by the way?
MR. BRUSCHI: I believe, you know, if he committed premeditated murder, thought out and committed murder, he should die for it.
MR. KLEIN: You would not want the State, for instance, spending money to house and feed this guy the rest of his life?
MR. BRUSCHI: No, I don't think so.

MR. KLEIN: This is not something you just felt about recently?
MR. BRUSCHI: I always felt that way.
MR. KLEIN: You feel that way pretty strongly?
MR. BRUSCHI: Yes, I do. MR. KLEIN: Do you feel strongly enough about it so you think it would color your judgment, whatever your judgment would be sometime down the road when you were to consider the issue of life or death in a premeditated murder case?
MR. BRUSCHI: It possibly could.

Although Mr. Bruschi told the prosecutor he believed he could set his personal views aside in rendering a recommendation, he later agreed with defense counsel that he was not "one hundred percent sure." Moreover, Mr. Bruschi openly expressed his doubts or reservations about his ability to render an impartial verdict based on his belief that certain murders deserve the death penalty. Thus, Mr. Bruschi's response to the court that he would follow the law does not overcome his attitude regarding the death penalty or his admitted belief that his views "possibly could" taint his ability to render an unbiased recommendation. *Williams; Hill.*

Likewise, Abufaris indicated that the death penalty is automatically warranted where a person is convicted of premeditated murder indicating a reasonable doubt as to her ability to render an unbiased recommendation. When asked by the prosecutor if she would follow the court's instruction, she responded, "Yes. I think I would." Furthermore, when asked if she could recommend a life sentence if the court's instructions led her to so conclude, Mrs. Abufaris indicated she "probably" would recommend a life sentence "in certain cases." In contrast, when asked whether the death penalty is the appropriate sentence where premeditated, intentional murder is proven, Mrs. Abufaris stated: "Yes, I think I would." Despite Mrs. Abufaris' agreement to follow the law and recommend a life sentence where appropriate, her responses ("I think" and "probably") were sufficiently unequivocal and arguably more in

line with pleasing the party asking the questions by providing the obvious, sought after responses. *See Williams.* Accordingly, it is apparent that this Court did not err in its assessment in Van Poyck's direct appeal that Abufaris and Bruschi's responses were sufficiently equivocal to cast doubt on their ability to set aside any personal biases and render a recommendation based solely on the evidence presented and the law as instructed by the court.[19]

In addition, and perhaps most unsettling of all, the majority opinion, in casually casting aside our prior holding, disregards the important and stabilizing legal doctrine of the law of the case without so much as a hint of explanation or justification. "Under this doctrine, all points of law which have been previously adjudicated by a majority of this Court may be reconsidered only where a subsequent hearing or trial develops material changes in the evidence, or where exceptional circumstances exist whereby reliance upon the previous decision would result in manifest injustice." *Henry v. State,* 649 So.2d 1361, 1364 (Fla.1994), *cert. denied,* 516 U.S. 830,

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[19] I disagree with Van Poyck's assertion that the responses of the two jurors (Moody and Bradford) who sat for the jury are virtually indistinguishable from the responses of Abufaris and Bruschi, and therefore, this Court should hold it was error not to excuse Moody and Bradford for cause. Initially, I note my accordance with the majority opinion that only juror Moody was identified to the trial court during Van Poyck's request for an additional peremptory strike and thus properly preserved for appellate review. *See* Majority op. at 931 n. 3. Juror Bradford was not identified to the trial court during Van Poyck's request for additional peremptory strikes, and therefore any error with regard to that juror has not been preserved for appellate review.

During voir dire, juror Moody asserted that she supports the death penalty; "If they are guilty, I am for." However, she later stated that she would make her decision based on the law as instructed and not on any personal opinions or beliefs. Moreover, she acknowledged that she would not automatically vote for the death penalty in every case in which a person is convicted of first-degree murder nor in every case in which a person is convicted of premeditated murder. Therefore, I would hold that the court did not err in denying Van Poyck's challenge for cause, as well as his request for an additional peremptory strike as to this juror.

116 S.Ct. 101, 133 L.Ed.2d 55 (1995); *Preston v. State,* 444 So.2d 939, 942 (Fla.1984); *see also U.S. Concrete Pipe Co. v. Bould,* 437 So.2d 1061, 1063 (Fla.1983) (holding that doctrine of law of the case is limited to rulings on questions of law actually presented and considered on former appeal); *Strazzulla v. Hendrick,* 177 So.2d 1, 4 (Fla.1965) (noting that "an exception to the general rule binding the parties to 'the law of the case' at the retrial and at all subsequent proceedings should not be made except in unusual circumstances and for the most cogent reasons—and always, of course, only where 'manifest injustice' will result from a strict and rigid adherence to the rule"). One such exceptional circumstance is an intervening decision by a higher court contrary to the decision in the former appeal. *Brunner Enterprises, Inc. v. Department of Revenue,* 452 So.2d 550, 553 (Fla.1984). However, "the exception to the rule should never be allowed when it would amount to nothing more than a second appeal on a question determined on the first appeal." *Strazzulla,* 177 So.2d at 4 (discussing exceptions to "law of case" doctrine).

The "bottom line" in this case is that when our established case law is properly applied to the juror qualification issues raised here, it demonstrates that a number of challenges for cause were erroneously denied and the defendant, now a convicted and death-sentenced defendant, was substantially prejudiced thereby.

KOGAN, C.J., and SHAW, J., concur.

715 So.2d 930, 23 Fla. L. Weekly S275

APPENDIX D

SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK,
Appellant,

v. No. 84324

STATE OF FLORIDA,
Appellee.

[March 27, 1997]
Rehearing Denied May 27, 1997

PER CURIAM:

William Van Poyck appeals an order entered pursuant to Florida Rule of Criminal Procedure 3.850, in which the trial court denied all relief. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. For the reasons expressed, we affirm the denial of Van Poyck's motion for post conviction relief.

Facts

The facts of this case are detailed in our decision, reported in *Van Poyck v. State,* 564 So.2d 1066 (Fla.1990), affirming Van Poyck's convictions and sentences. In summary, the relevant events unfolded as follows. On June 24, 1987, state inmate James O'Brien was transported to the office of a dermatologist by two corrections officers. Officer Griffis drove the van and was unarmed. Officer Turner was responsible for watching O'Brien, the two separated by a cage. Upon arriving at the dermatologist's office, Officer Turner turned his eyes downward looking for paperwork. When Turner looked back up, he saw Van Poyck, who had approached the van, aiming a gun at his head. Officer Turner was forced out of the van and

ordered to crawl underneath the vehicle. While Officer Turner was getting under the van, Frank Valdez, one of Van Poyck's accomplices, was approaching the driver's side of the van. Officer Turner, from underneath the van, saw Officer Griffis forced out of the van and taken to the back of the vehicle. Then, while noticing two sets of feet near the back of the van, he heard the gunshots that killed Officer Griffis. Officer Turner did say, however, that he was unable to testify as to Van Poyck's location when the shooting occurred. Officer Griffis was shot three times, once with the barrel of the gun placed to his head.

Van Poyck was tried and convicted for first-degree murder, attempted first- degree murder, aiding in an attempted escape, aggravated assault, and six counts of attempted manslaughter. By a vote of eleven to one, the jury recommended that the penalty of death be imposed. The trial judge followed the jury's recommendation and sentenced Van Poyck to death. On direct appeal, Van Poyck raised six guilt-phase issues and fifteen penalty-phase issues. This Court, in our initial opinion, found the evidence could not sustain the conviction of premeditated murder but upheld the first-degree murder conviction on the theory of felony murder. After that pronouncement, we rejected or found harmless all other claims and affirmed Van Poyck's convictions and sentences.

Van Poyck then filed a motion to vacate his convictions and death sentence, pursuant to rule 3.850, on December 8, 1992. A substantial evidentiary hearing was held on multiple issues after which the lower court denied all relief.

In his appeal of that order, Van Poyck raises sixteen claims. We find that none warrant relief. Accordingly, we affirm the lower court's order.

Ineffective Assistance of Penalty-Phase Counsel

Van Poyck's first two claims center around the representation he received at the penalty-phase proceeding. He argues that his counsel was ineffective. We disagree. Further, he asserts that the lower court inappropriately limited his ability to prove the ineffective nature of his penalty-phase representation by refusing to reopen the evidentiary hearing or to supplement the record when an affidavit became available after the close of the proceedings. We also find no merit in this assertion.

Van Poyck's claim of ineffective penalty-phase representation is based on the allegation that his trial counsel, Cary Klein, failed to adequately investigate mitigating evidence of Van Poyck's problematic life and mental- health histories. The two-prong standard for evaluating an ineffective assistance of counsel claim, set forth in *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), requires: (1) that the defendant first demonstrate deficient performance by counsel; and (2) that the defendant then demonstrate that such deficient performance caused prejudice. Based on the record in this case, Van Poyck has not demonstrated deficient performance by his counsel.

At the outset, it must be understood that Van Poyck argues two distinct areas of deficiency. He argues that Klein should have investigated, discovered, and presented both his life history and his mental-health history. As to his claim regarding deficient investigation and presentation of mental- health evidence, we find that Klein had clear tactical reasons for avoiding such a line of argument. The following testimony from Klein at the evidentiary hearing below illuminates Klein's tactical considerations:

> Q: [By prosecutor Geesey]:
> During the course of your representation of this defendant, you've indicated that you obtained his jail

records. Were you referring to Department of Corrections records?
A: Yes.
Q: When did you obtain those records and—
A: I don't recall exactly the date. It was fairly early on in the representation. I would say sometime by late fall we had gotten his DOC records or sometime by the winter.
Q: Why did you want his DOC records?
A: We sent away for his Department of Correction records because he had spent the last 15 or so years in the Department of Corrections. From the time he was 17 or so until maybe 6 months before the crime happened, that's where all of his time was spent. The Department of Corrections also had all of his mental health records from the time he was in DOC so we would need those, also.
One of the things we were looking for, and this was a suggestion of Mr. Van Poyck's, if he had a decent prison record or there were some people willing to testify that he could be a model prisoner, that might be a mitigating circumstance, a jury believing that he could be a model prisoner in the prison system might be willing to let him spend the rest of his life in the prison system so we sent away for those prison records.
The prison records also had his prior crimes, prior convictions, some of the judgments in them. It would have a lot of things we would need to help us prepare primarily for phase two but even, to some degree, for phase one. If we decided to have him testify, we'd need to know what convictions he had. That would be in Department of Corrections records.
Q: Obviously well may have.
Have you reviewed your time sheets and your billing from back in '87 and '88 recently?
A: No, I haven't, not since I submitted the bill on the case which was probably 4 to 6 months after the trial was over.

Q: Did you have any recollection of approximately how many hours you spent reviewing those DOC records?
A: I could only estimate. It had to take at least 10 hours. It took the better part of two complete days to get through most of the records and that's even with skimming some of them.
Q: And in those records, you were looking for what type of evidence, specifically?
A: *I was looking for, specifically, mental health records. I wanted to see what happened in the mid '70's, why he was—why he was sent to Chattahootchee, what the diagnosis was, the prognosis, why he came back.*
I was looking also, very specifically, for whether I could get anything out of his prison records that would be mitigating in terms of him being a model prisoner, a good prisoner. Specifically, that is really the two specific things we were looking for.
Q: First of all, did you find anything in those records that would give you evidence that he was a model prisoner and that you could perhaps use as a non statutory mitigating circumstance?
A: No, I didn't find anything that was really helpful in that regard.
Q: And, in fact, was it fairly—how would you describe the number of disciplinary reports and the type of offenses he committed for those?
A: Well, he had several D.R.'s. He had quite a number of them. Obviously, he had done a lot of fighting in prison.
Q: Were there any weapon offenses for the D.R.'s?
A: I think there were one or two weapon offenses. He had had some escapes, also.
Q: Did you see anything in those records that you could use to establish a nonstatutory mitigating circumstance?
A: At one point I thought that I could take at least the 5 years of his prison record and use some of that because it got progressively better as he was there. The first 10

years or so he was in prison, it was horrible. As I guess he learned how to play the system, it got better but even in the last 5 years, I think he got one or two D.R.'s. I didn't think we could use any of that without having the previous 10 years come in from the State to make it look even worse than it was.

Q: You felt that it couldn't be done without opening the door?

A: Right.

....

Q: From your review of those records, did you believe that there was anything in there that would be of assistance in a penalty phase?

A: I thought the fact that he had been in Chattahootchee and the previous mental health encounters would be of some mitigating or might be of some mitigating use in phase two.

Q: At some point in time was there a decision made not to use that evidence?

A: Yes.

Q: When was that decision made?

A: Well, initially, the decision was made. Although it wasn't hard and fast, I was inclined not to use them. When I spoke to Mr. Van Poyck he explained to me that he had faked some of the brief mental illness. He faked the light bulb incident and we had a good laugh over that. And I probably would have used it, notwithstanding, if I had gotten some help later on from some mental health experts that perhaps he was, notwithstanding what he told me, he was still mentally ill.

Q: When did the defendant tell you that he had faked some of his mental health history and faked the incident with the light bulb?

A: Well, I'm trying to remember the first time it came up. I think the first time it came up I'm not sure Mike [co-counsel Dubiner] was even appointed. Actually, I think he was appointed, which meant it was probably

the summer of '88. It was probably either late spring or summer of '88.
After Mike Dubiner was appointed, we had a conversation in the jail. He had told me that he denied that he was really sick in the '70's and he told me he had like made it all up to get out of the prison population to go to Chattahoochee.
Q: When the defendant told you this, did you question in your own mind whether or not he was being truthful with you?
A: Initially, no, I don't think I really questioned it. I think I accepted what he was telling me. He went into detail. I mean, he wasn't delusional, at the time. He had a pretty good recall of most of the facts and fairly decent sense of humor about the incident. He understood the circumstances, at the present time. What I did have is doubts, not about his truthfulness but I had doubts about why he was telling me that.
Q: Were you concerned about that?
A: Yes, I was pretty—
Q: *Let's go specifically into what the defendant told you in the summer of ' 88 about his faking.*
First of all, did the defendant say anything about any preparation before he began faking this mental illness?
A: *He told me that he had gone to the prison library and looked up some books on schizophrenia and mental illness, had done extensive reading on it in preparation for this charade.*
Q: How long did he tell you that he had spent preparing and reading and studying for all of this?
A: He didn't tell me how long. I don't recall if he told me specifically how long but I got the impression he was fairly well—if he was telling me the truth, that he had prepared pretty well for it because he fooled the doctors, obviously, at Chattahoochee at Florida State Hospital.
Q: Did the defendant say how he was able to obtain these materials, read and study these materials? Did

that seem consistent with his cognitive ability that he demonstrated to you in his legal research?
A: It did. It was probably one of the reasons I probably believed him without much doubt, yes.
Q: *And what did he say, specifically, about how he faked the mental history?*
A: *I think he explained to me how he made it appear that he was chewing on this light bulb.*
Q: *What did the defendant say about that?*
A: *I think he said he put something in his mouth that made a crunch or something like that and they were convinced he was eating a light bulb.*
Q: *Did he have light bulb parts?*
A: *Yes, he was like spitting out the little metal pieces. He didn't go into great detail about it but it was enough to convince me that he had pulled a little sleight of hand on them.*
....
Q. Did you want to open the door to any evidence of the defendant's escape or attempted escape while incarcerated on other charges earlier in his life?
A. No.
Q. Did you think that would have a detrimental effect in seeking a life recommendation from the jury?
A. Clearly that would've had a detrimental effect. We did not want the jury to know this was not a person who could be trusted for life in prison.
Q. Earlier on defense counsel showed you State's Exhibit Number 2 and that it was a report of the defendant in 1977 stating that he had expected to end up on death row someday and he would not hesitate to destroy a snake in a brown shirt. Is that information that you would have wanted to come in front of a jury in a penalty phase?
A. No, I don't think so.
Q. Would you want to do anything to call attention to that document on the part of the prosecutor?
A. No.

Q. Also, in cross examination, the defense counsel asked you about the five years aggravation in the defendant's parole in 1980 because of his mental health history. That took place in 1980; correct?
A. Yes, and it was litigated for a number of years thereafter.
Q. After that occurred in 1980, was there any additional evidence of mental disturbance on the part of the defendant?
A. No.
Q. He was cured from that point on?
A. As far as I know he was mentally healthy for the remainder of the 80's.
Q. Concerning the issue of voluntary intoxication, was that successful for the codefendant?
A. No.
Q. Did you think it was a viable defense for your client?
A. No.

(Emphasis added.) This extended excerpt demonstrates that Klein had quite adequate reasons for limiting his use of the prison records and thereby limiting the presentation of Van Poyck's mental-health history. Further, Klein testified that Dr. Villalobos, after examining Van Poyck prior to the penalty phase, reported that Van Poyck was a sociopath. Indeed, Klein testified that Dr. Villalobos asked not to be called as a witness because his findings would not be helpful. This information only strengthens Klein's tactical choice. While we acknowledge that Klein's co-counsel Dubiner testified that they were unprepared for the penalty-phase proceeding and, in his opinion, should have spent more time preparing mental-health evidence for presentation, we will not second-guess Klein's clearly tactical choice. *See Cherry v. State,* 659 So.2d 1069, 1073 (Fla.1995)(concluding that present counsel's disagreements as to strategy does not necessarily satisfy *Strickland* because standard is not how present counsel would have, in hindsight, proceeded).

As to Klein's choices regarding the presentation of Van Poyck's life history during the penalty-phase proceeding, we likewise find no error. Evidence of Van Poyck's life history was adequately presented by Klein at the penalty-phase proceeding.[20] Indeed, the jury was actually aware of most aspects of Van Poyck's life that he now argues should have been presented. Klein testified to the following in the evidentiary hearing below:

> Q: Did you ask the defendant any questions to try and find out what you could do in a penalty phase?
> A: We discussed it constantly, constantly. He was very up on it.
> Q: What kind of questions?
> A: I asked him who I could contact, who I could call, who were your friends when you were kids? I didn't have any. Tell me about your family. Well, the only one still in contact is my stepmother and my brother, so on and so forth. I don't mean to tell you that he was directing what to do but he had a tremendous input, being intelligent and knowing the mitigating circumstances, both statutory and nonstatutory. We considered like a list of 18—I think it was 15, 16, 18 nonstatutory mitigating circumstances.
> In fact, I put them up in closing argument in phase two. I must have listed 12 or 13 nonstatutory [circumstances] that we could not actually prove other than the couple that we tried to prove that I suspected were there but none could we show.
> Q: Did you ask the defendant if he had ever been raped?
> A: We talked about that. He told me that he had not. He didn't have that many problems in jail; that he was

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[20] It must be noted that Van Poyck blurs the line between his life history and his mental-health history in this portion of his brief. To the extent that he reargues that Klein was deficient for failing to adequately investigate and present Van Poyck's mental-health history, we ignore such argument as it has been resolved above.

able to take care of himself and they generally left him alone.

At the penalty-phase proceeding, defense testimony was presented by Deborah Chisholm, Jeffrey Van Poyck, Anne Van Poyck, Lee Van Poyck, and by Van Poyck himself. Chisholm was a nurse at the Palm Beach County Jail when she met Van Poyck. She testified that Van Poyck was a "very caring person, very friendly, very loving and very intelligent and somebody that I really enjoyed talking to." Further, she testified that Van Poyck had indicated to her that he did not kill Griffis and that he was sorry that the shooting had happened.

Jeffrey Van Poyck is Van Poyck's brother. Klein testified that he made the tactical decision to call Jeffrey Van Poyck for the following reason:

> One of the reasons why I called Jeff, I wanted Jeff to testify before the jury because I wanted these people to see that this was his only role model from the time he was a little baby. Jeff, who was his brother, I think was serving, at the time, I think a 40 year prison sentence for armed robbery.
> You had to be there to listen to this guy's testimony. I think he was the most cold and chilling witness I had ever seen on the witness stand. As it turned out, I think the jury hated this guy, couldn't stand him. But I felt like we had to call him because if I had tried to explain to [the] jury what kind of role model or influence he was, they wouldn't have believed me. I thought they had to see Jeff for themselves to understand how chilling, cold an influence this person would've had on Bill. But again, we had no psychological underpinning for it.

Jeffrey Van Poyck testified to the facts surrounding his mother's death. The defendant was very young when his mother passed away. Jeffrey Van Poyck then testified that his

father hired Ms. Dano to take care of both the house and the children (Jeffrey, William, and Lisa). She was a strict disciplinarian. Indeed, she beat the three children until their father fired her at gunpoint. At that point, Jeffrey Van Poyck testified, Aunt Phyllis moved into the house and cared for the three children. She remained as caretaker until the elder Van Poyck (their father) married Lee Hightower. Finally, Jeffrey Van Poyck extensively testified to his life in crime (500 burglaries, he claimed, prior to his first arrest) and the influence such an example could have had on the defendant.

Anne Van Poyck was the defendant's aunt. She gave insight into Aunt Phyllis. First, she testified that Phyllis may not have been the woman's real name. Second, she testified that the children's natural mother was named Phyllis. Third, she revealed that Aunt Phyllis told the children that she was their real mother. Finally, her testimony was that she was not impressed with Aunt Phyllis' ability as a surrogate mother and that she considered Aunt Phyllis to be an unstable person.

Lee Hightower Van Poyck is the defendant's stepmother. Her testimony provided insight into the personality of the defendant's father, Walter Van Poyck. She stated:

> Well, first of all, he was a very good man. He was a very kind man, a very caring man.
> As you probably know, he was disabled. He lost his leg in World War II in the Holland invasion.
> Consequently, he was not with the children as active as an ordinary father would be. He was unable to do certain things with the children, but he was a good father.
> ....
> Let me say this: Walt Van Poyck loved his family. He has difficulty demonstrating that love. He was not demonstrative but he was kind and he was gentle and he was caring, but he wasn't outgoing with his affection.

Lee Hightower Van Poyck also verified that Aunt Phyllis had grown up being called Amy but changed her name to Phyllis at some point. She also thought that Aunt Phyllis was unstable. Finally, she opined that Jeffrey Van Poyck had been a bad influence on the defendant.

Notably, defendant Van Poyck then testified to the following:

> Q Mr. Van Poyck, you heard your mother testify today and you heard your brother testify about some remorse that you showed in writing some letters. *If you would forget for a second whatever letters you may have written, Mr. Van Poyck, how do you feel about the—about your actions regarding the incident of June 24, 1987?*
> A *Well, I take responsibility for the fact that—if I had not made a decision to free James O'Brien, Mr. Griffis would still be alive.*
> Q *Mr. Van Poyck, you heard testimony about your brother, Jeffrey, and his influence on you. You heard Jeffrey testify. Is it Jeffrey's fault that you are the way you are today?*
> A *I can't say that, no, sir.*
> Q *Why not?*
> A *I happen to believe that people should be responsible for their own actions.*
> Q Do you consider yourself a fairly intelligent person?
> A I would hope so.

(Emphasis added.) Clearly, Klein did an adequate job of presenting Van Poyck's life history. In sum, we conclude that Klein's performance was not deficient in presenting Van Poyck's mental-health and life histories. Indeed, Klein tactically avoided presenting (or opening the door to the presentation of) events severely disadvantageous to Van Poyck's cause. Accordingly, we find no merit to the claim that

Van Poyck received ineffective assistance of counsel at the penalty phase of his trial.[21]

Van Poyck's second argument relating to his penalty-phase representation is that the court below erred in refusing to allow him to either supplement the record or to reopen the evidentiary hearing on the post- conviction motion. The purpose of such reopening or supplementation would be to secure the affidavit or testimony of Dr. Villalobos in relation to his conversations with Klein. Dr. Villalobos presumably denies making certain statements to Klein. As noted earlier, Klein testified that Dr. Villalobos told him that Van Poyck was a sociopath. Indeed, the lower court cited this fact to bolster its conclusion that Klein's decisions were part of a tactical plan. It now seems that Dr. Villalobos, if allowed, would deny making such a statement.

In evaluating the impact of the judge's action, we must look at the type of claim Van Poyck raises. The trial judge's denial of Van Poyck's motion to reopen or to supplement is only harmful to him if the refused material would be determinative of a valid claim. In this case, Van Poyck is trying to use Dr. Villalobos' testimony or affidavit to prove ineffective assistance of penalty- phase counsel. If such ineffective assistance of counsel could not be proven even with the additional testimony or affidavit, any error in refusing to reopen or supplement would be harmless.

We have already stated that the record, as currently comprised, demonstrates no penalty-phase deficiency by Klein.

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[21] We note that Van Poyck raised this same claim in his direct appeal. At that time we disposed of the issue by stating that "[a]fter fully considering these issues in light of the record in this cause, we find no error which requires a new sentencing proceeding." *Van Poyck v. State,* 564 So.2d 1066, 1070 (Fla.1990). The State, however, argued in its direct-appeal brief that "[a]ppellee contends that the issue is improperly before this Court on direct appeal." As is proper, the State does not argue that the claim is procedurally barred in this collateral action. We choose to address this claim on its merits. For the reasons explained, though, we find that it has no merit.

Would the testimony or affidavit of Dr. Villalobos change that? Two large assumptions would have to be made in order to contemplate such a change. First, it would have to be assumed that Dr. Villalobos' testimony or affidavit would be given more credibility and weight than Klein's testimony. Second, it would have to be assumed that Klein's tactical decision as to mental-health evidence is crippled if he truly received no information from Dr. Villalobos (as the doctor claims) instead of negative information (as Klein claims). It is not at all clear that either of these assumptions is valid. In the first instance, Klein's testimony is quite convincing. Indeed, there is scant evidence that Klein's testimony even came as a surprise to Van Poyck. In the second instance, it must be remembered that Klein testified that he was inclined to refrain from presenting mental-health evidence as mitigation unless a mental-health expert could actually say Van Poyck was mentally ill. Dr. Villalobos was not, by any account, prepared to make that statement. In fact, the affidavit signed by Dr. Villalobos (at issue in this particular motion) made no such affirmative claim. The affidavit reflects only that Dr. Villalobos had insufficient time to make any evaluation. Van Poyck attributes the insufficiency of examination time to Klein's deficient preparation. Even if Dr. Villalobos told Klein that he had insufficient time to offer any opinion, it is by no means certain that Klein would have been deficient for making the tactical decision to refrain from presenting (thereby halting his search for a mental-health expert) mental- health mitigation. As we have already demonstrated, Van Poyck's prison records were full of unsavory information that Klein has testified he wanted to keep from the jury. With this said, though, we will grant, arguendo, that both assumptions outlined above are valid and that Dr. Villalobos' affidavit or testimony would prove Klein's penalty-phase performance deficient. In such an event, Van Poyck still has to demonstrate that he was prejudiced. He cannot do so because this record will not support such a conclusion.

Any mental-health evidence that might have been produced would have been severely undermined by the contents

of Van Poyck's prison records. Those records included extensive documentation as to examinations and conclusions by prison doctors. On September 26, 1975, Van Poyck was presented to the Forensic Unit Staff Conference. The conference was attended by doctors Ogburn, Dachtera, and Mehta. Their final diagnosis was that Van Poyck suffered from "Personality Disorder, Antisocial Type with Paranoid Features." Then, on November 20, 1975, Dr. Margarita Gonzalez examined Van Poyck. She diagnosed Van Poyck with: (1) personality disorder, antisocial type with paranoid features; and (2) drug abuse, multiple. On February 26, 1976, Dr. Delfina Johnson examined Van Poyck and found no psychosis at the time. Once again, on May 27, 1983, Dr. Sotomayor evaluated Van Poyck and concluded that he did not "reveal any signs of psychosis." In fact, Van Poyck told Dr. Sotomayor that "[a]'int nothing wrong with me now. Am working and trying hard to behave myself." The following year, on June 6, 1984, another report was filed which found that "[s]ince Van Poyck exhibits an absence of any acute distress or mental disorder, treatment is not indicated and none is recommended." The prison records clearly contain an abundance of medical evidence indicating that Van Poyck's mental condition, if any, would not be mitigating in nature. Any testimony developed by the defense through mental- health experts would certainly be tempered by its inconsistency with the medical reports in the prison records. The records also contain the following information that would certainly be damaging to Van Poyck.

Over twenty prison disciplinary reports were filed against Van Poyck. Further, he had an attempted escape in his records. On that point, Klein specifically testified that he wanted to keep such information from the jury because of the negative impact it would have on seeking a life recommendation. The records also reflect that in March of 1977, Van Poyck was placed in administrative confinement after getting caught typing a letter to another inmate. In that letter he stated, "I know for a fact that I am going to end up on death row within a couple of years." He also stated, "I would

not hesitate to destroy any snake in a brown uniform." It must also be remembered that Van Poyck admitted to Klein that he faked the light bulb incident. If Klein had proceeded to use the incident as mitigating in nature, he would have been faced with an ethical problem. He would have encountered a situation in which his duty of candor towards the court required the revelation of Van Poyck's admission. The problematic nature of such a predicament is obvious.

Even as we assume, arguendo, that Klein should have allowed more time for mental-health evaluations of Van Poyck by experts, it cannot be denied that the force of the above information would probably dwarf any expert testimony Klein might have secured. In the context of this case, there is no possibility that Van Poyck could demonstrate that "but for counsel's errors he would have probably received a life sentence." *Hildwin v. Dugger,* 654 So.2d 107, 109 (Fla.1995). In reaching this conclusion, we have taken into account the testimony offered by Dr. Robert T.M. Phillips. Dr. Phillips specifically opined that Van Poyck

> is an individual who has suffered from what we would describe as a psychoactive substance abuse, organic mental disorder, which is a long winded, perhaps unnecessary saying, this is someone who has suffered from the ravages of alcohol and drug dependency and at the height of their dependency is most dysfunctional.

Dr. Phillips also opined that Van Poyck suffered from a schizo- affective disorder, a disorder described as being "not quite schizophrenia." We restate that, when considered in the context of the entire record, an isolated advantageous evaluation cannot be considered determinative.

In light of our finding that Van Poyck cannot demonstrate prejudice, the supplementation of the record or the reopening of the evidentiary hearing would not have led to a finding of ineffective assistance of penalty-phase counsel. An

error, if any, in refusing to reopen or to supplement is consequently harmless beyond a reasonable doubt.

Ineffective Assistance of Guilt-Phase Counsel

We next address Van Poyck's claim that he was denied effective assistance of counsel at the guilt phase of his trial. Specifically, Van Poyck claims that his guilt-phase representation was ineffective in the following ten ways: (1) by failing to demonstrate that Van Poyck was not the triggerman; (2) by failing to impeach the testimony of Officer Turner; (3) by failing to present a voluntary intoxication defense; (4) by failing to pursue a motion to change venue; (5) by failing to adequately conduct voir dire; (6) by conceding the underlying felonies of robbery and escape; (7) by failing to preserve a *Batson*[22] violation; (8) by allowing a shift in the burden of proof; (9) by allowing Van Poyck to take a large role in trial preparations; and (10) by failing to object to prejudicial statements by the prosecutor. More generally, Van Poyck also complains that the court below erred in summarily denying certain claims, thereby denying him a full and fair hearing. We disagree. We affirm the trial court's denial of all relief on this issue. Prior to addressing any of the individual areas of concern as to guilt-phase representation, however, we point out the following insightful testimony offered by Van Poyck's trial co-counsel (Michael Dubiner, now a key Van Poyck witness) at the evidentiary hearing below:

> Q: You testified on direct that this was a loser in guilt phase. Is that still your opinion today?
> A [Dubiner]: No question about it.
> ....
> Q: There were numerous witnesses who identified the defendant as being involved in the escape attempt, isn't that correct?
> A: Yes.

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[22] *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Q: The murder weapon was found in the vehicle where the defendant was eventually arrested with Valdes, correct?
A: That's correct.
Q: Officer Turner's weapon that was taken from him during the commission of this crime was found in that motor vehicle, correct?
A: That's correct.
Q: There's never an identity issue as to whether the defendant was involved in that escape attempt, identity was never in issue?
A: No.
Q: Would anything have changed the outcome of that guilt phase?
A: No. I think that the strong likelihood is that any defense that was presented in Phase I would have led to a first-degree murder conviction.

Surely this testimony from a defense witness militates towards a finding that Van Poyck could not have suffered prejudice under the second prong of *Strickland.* Dubiner's testimony is reinforced by the statements, on cross-examination, of another defense witness (at the evidentiary hearing below), Carey Haughwout. She stated:

Q: My question is very specifically to the guilt phase of that trial, is there a viable defense?
A: No, I don't believe that there is a defense that would have resulted in an acquittal, no.
Q: There is no voluntary intoxication defense?
A: Not that would have resulted in an acquittal, no.
Q: There is no insanity defense for the guilt phase?
A: Not that would have resulted in an acquittal.
Q: There's no defense of any kind to the guilt phase?
A: That's—I think that's what I said before, yes.

Our review of the record confirms the opinions expressed by both Dubiner and Haughwout. Even if trial

counsel were, arguendo, deficient at the guilt phase, Van Poyck was not prejudiced by any of those mistakes. We stress, however, that we find few deficiencies. For instance, Klein clearly had tactical reasons for limiting his presentation of evidence that might indicate a triggerman other than Van Poyck. Klein testified at the evidentiary hearing below that he did not want to give up his "sandwich." In other words, he did not want to lose the opportunity of giving two closing arguments at the guilt phase. To that end, he stated the following:

> Q: Was there—when you talked about the fact that it was important to save the sandwich, you're talking about the ability for the defense to argue first and last if there's no evidence offered aside from the testimony of the defendant?
> A: Yes.
> Q: Was that significantly important to you, sir?
> A: It was. It was very important to both Mr. Dubiner and myself.
> Q: Do you place an importance of argument over evidence?
> A: Generally, no, I don't. But I thought in this case it was very important to have the opening salvo and the closing salvo.
> Q: Was argument an important portion of Mr. Van Poyck's capital case for the defense?
> A: Yes.
> Q: How important?
> A: Argument?
> Q: Yes.
> A: Since we didn't have any exculpatory evidence, I would say it was crucial.

We find it clear that Klein had sufficient tactical reasons for refraining from the presentation of further direct evidence (in the form of DNA tests and receipts from a gun shop) as to the triggerman's identity.

Van Poyck also alleges that Klein was deficient in his cross- examination of Officer Turner, the guard who survived the incident. As to that cross-examination, Klein testified at the evidentiary hearing as follows:

> Q. Before going into that cross-examination, had you made some decision about how you were going to approach Mr. Turner?
> A. I had many, many months to think about it, yes. I made a decision we were—that I was not going to flat out attack him but be somewhat sensitive in cross-examining Mr. Turner because I thought he would be very sympathetic to the jury.
> Q. And it was a tactical decision, I take it, that you're describing?
> A. Yes, I suppose you could put it that way. It was tactical. Him being the surviving guard in the incident, I thought the jury would have tremendous sympathy for him and I think probably would look askance on anybody directly attacking this guy. He was lucky to be alive, after all.

Despite these practical considerations, Klein still conducted a thorough cross-examination. His performance in this area was not deficient.

Next, Van Poyck argues that Klein was deficient in failing to investigate a voluntary intoxication defense. The record refutes any suggestion that Van Poyck was intoxicated at the time of the offense. Indeed, Van Poyck himself told Klein that he was sober. Further, Klein independently investigated the possibility that there was cocaine in the car used. He found no evidence of such substance. Klein was not deficient for rejecting this theory of defense.

In sum, Van Poyck was not denied effective assistance of counsel at the guilt phase. We can find few, if any,

deficiencies in Klein's performance. More important, however, is that fact that Van Poyck can demonstrate no prejudice. Van Poyck has the heavy burden of demonstrating that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. Our review of the record demonstrates that the result in the guilt phase of this case is certainly reliable. This is reinforced by the testimony, at the evidentiary hearing below, of two of Van Poyck's own witnesses. We affirm the holding of the court below on this issue.

Brady Claim

As his fifth[23] issue, Van Poyck claims that a note in the state attorney's file was withheld from him during discovery. He further claims that the note was both material and exculpatory. In *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." The note at issue is not evidence. Instead, it is work-product. Even if it were evidence, though, it would not be material. In *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 3383-84, 87 L.Ed.2d 481, (1985)(Blackmun, J., plurality opinion), *id.* at 685, 105 S.Ct. at 3385 (White, J., concurring in part and concurring in judgment), the United States Supreme Court forwarded the following formulation for determining materiality: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Applying such a materiality standard to the facts of this case, there is clearly no reasonable probability that the result would have been altered had the challenged note been

[23] Van Poyck's fourth issue concerning the great risk to many aggravating circumstance is procedurally barred and will, consequently, be addressed with other procedurally barred issues after we finish rejecting the claims that merit substantive review.

disclosed. The contents of the challenged note indicated that the "wound [came] from the driver's side." This presumptively militated against a finding that Van Poyck was the triggerman. It would certainly have no effect on Van Poyck's conviction for felony murder. Therefore, the court below properly rejected this claim. We affirm the denial of relief.

Remainder of Van Poyck's Claims

The remainder of Van Poyck's claims are as follows: (4) the great risk to many aggravating circumstance was unconstitutionally vague; (6) the judge and jury weighed the invalid aggravating factors that the murder was premeditated or that Van Poyck was the triggerman; (7) the prosecutorial argument as well as the jury instructions improperly shifted the burden of proof during the penalty phase proceedings; (8) the trial court improperly denied Van Poyck's challenges for cause during jury selection; (9) Van Poyck's constitutional rights were violated by the prosecutor's conduct during trial; (10) the acquittal and affidavit of O'Brien together with the testimony of Turner necessitate a new trial; (11) *Enmund /Tison*[24] errors necessitate a reversal of Van Poyck's death sentence; (12) the consideration, as an aggravating circumstance, of the underlying felony that had already been utilized to convict Van Poyck of felony murder was improper; (13) the trial court and prosecutor erred in indicating to the jury that sympathy was an inappropriate consideration; (14) the trial court failed to conduct an independent evaluation of the mitigation offered by Van Poyck; (15) the jury instructions given at the penalty phase were vague and confusing; and (16) the trial court committed fundamental error by failing to instruct the jury on justifiable or excusable homicide as part of the instruction on manslaughter.

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[24] *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987); *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

All of these claims are procedurally barred. Most were raised and rejected on direct appeal.[25] One of these claims was not objected to at trial and fails to rise to the level of fundamental error.[26] Finally, two of the claims are waived because they should have been raised on direct appeal.[27]

For the reasons expressed, we affirm the lower court's denial of all relief.

It is so ordered.

OVERTON, GRIMES, HARDING and WELLS, JJ., concur.

ANSTEAD, J., concurs in part and dissents in part with an opinion, in which KOGAN, C.J. and SHAW, J., concur.

ANSTEAD, Judge, concurring in part and dissenting in part.

I dissent from that part of the opinion finding no error in the trial court's failure to consider the evidence of Dr. Villalobos, and in the majority's approval of the trial court's finding that trial counsel performed competently in

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[25] Claims that were raised and resolved on direct appeal include (4), (6), (8), (10)(this material does not qualify as newly discovered evidence and the challenges to the convictions for attempted escape and premeditated murder were resolved in the direct appeal), (11), (12), (14), and (15). As to claim (4), we specifically stated in the direct appeal that "[w]e find that none of the other claims merit discussion. Further, we conclude that each of the aggravating circumstances found by the trial judge was properly established in this record and that the trial judge could properly conclude that the aggravating circumstances outweighed the mitigating evidence in this cause." *Van Poyck*, 564 So.2d at 1071. No subsequent change in the law is relevant to this analysis and therefore the procedural bar remains in place.

[26] Claim (9) is barred due to a lack of a contemporaneous objection at trial. Any error would not be fundamental.

[27] Claims (7) and (13) should have been raised on direct appeal.

investigating and preparing appellant's case for the penalty phase proceedings. This Court was faced with almost the identical circumstances in *Deaton v. Dugger,* 635 So.2d 4, 9 (Fla.1993), wherein we held that counsel who waited until after the guilt phase to prepare for the penalty phase and then "scrambled" to investigate and prepare mitigation "deprived [the defendant] of a reliable penalty phase proceeding." The same holding is mandated here.

The trial court ignored the issue of the failure to investigate and, instead, focused entirely on the apparently misrepresented statements of Dr. Villalobos, and the trial court's speculation that appellant's bad record would have resulted in a death recommendation regardless of any mitigation. Similarly, the majority here has ignored the undisputed evidence of lack of investigation and preparation, as well as this Court's own prior opinion which demonstrates counsel's utter failure to present any viable mitigating evidence to the trial judge and jury. See *Van Poyck v. State,* 564 So.2d 1066 (Fla.1990). The majority fails to acknowledge, for example, that even the meager mitigation evidence presented by counsel was not put together until after the penalty phase began, and even then counsel conceded he had to "scramble" to put anything on.[28] Further, the attempt at mitigation by this "scramble" actually backfired when the trial court not only rejected it, but used it to bolster the case against the defendant. *See* 564 So.2d at 1069.

The majority has simply rehashed a lot of general information known to trial counsel in an attempt to put the best face on a very bad situation. Tellingly, the majority has devoted some ten pages to a vain attempt to support a flawed

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[28] This "scramble" included the ill-fated attempt to use Dr. Villalobos, who, without time to do and review testing and secure background materials on the defendant, refused to get involved.

analysis of less than two pages issued by the trial court.[29] *See* Majority op. at 688-695.

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[29] The entire analysis and findings of the trial court are set out in less than two (2) pages that state:

> The great bulk of all the testimony received by the Court centers around counsel's alleged ineffective assistance during the penalty phase. Both trial co-counsel, Dubiner and Petitioner's expert, Haughwout, testified in great depth on this issue.
>
> Petitioner also presented the live expert testimony of Jan Vogelsang, a licensed clinical social worker, and Dr. Robert Phillips, a psychiatrist, along with the affidavits of two additional experts. Eight of the remaining nine live witnesses and most of the affiants were lay people, all of who [sic] testified to different aspects about the Petitioner's dysfunctional background. Each stated they could and would have testified during the penalty phase of the trial if called upon to do so.
>
> The nexus of Petitioner's argument under this claim is primarily based upon the allegation that counsel failed to conduct a penalty phase investigation until the conclusion of the guilt-innocence phase; that what investigation was done was totally inadequate and ineffective and failed to present any in-depth mitigating mental health and background evidence. The sole witness presented by the State was Petitioner's trial co-counsel, Cary Klein. Despite Petitioner's evidence to the contrary, Klein investigated the possibility of mitigating mental health factors. In fact, he obtained the services of one Dr. Villalobos, a psychiatrist, who after interviewing the Petitioner prior to the penalty phase and reviewing psychological tests performed upon the Petitioner, told Klein that he, Dr. Villalobos, had nothing helpful to say about the Petitioner. Dr. Villalobos also told Klein that the Petitioner had told him that he, the Petitioner, had faked mental illness while in prison. Dr. Villalobos further informed Klein that the test results were unfavorable to Petitioner, that petitioner was a sociopath, and that he saw no evidence of organic brain syndrome. Armed with this information together with Petitioner's attempted escapes and long history of incarceration, Klein made a conscious, tactical judgment not to pursue this line of defense in the penalty phase of the trial for fear of opening a Pandora's box.

In view of the overwhelming evidence of guilt coupled with the Petitioner's extensive criminal and juvenile background, his admissions at the time of the trial, and in light of the 11 to 1 vote to impose the death penalty (which means a minimum of 5 jurors would have had to have voted differently), Petitioner has failed to carry the burden established by the United States Supreme Court in *Strickland,* i.e. the probability of a different trial outcome.

The undisputed facts in this case present a blatant example of counsel's failure to investigate and prepare a penalty phase defense. Once again, we have a lawyer appointed who had absolutely no experience in capital cases. Now, there are many resourceful and talented lawyers who, although lacking specific experience, would be able to learn the system and do an outstanding job of investigating and preparing a defense. However, in this case we have an inexperienced lawyer who has conceded that he was unprepared and, in his words "caught with [his] pants down," because he had erroneously assumed that the trial court would grant a lengthy continuance between the guilt phase and the penalty phase of the proceedings.

We do not have to guess at whether counsel did a proper investigation and prepared a defense *before* the penalty phase began: counsel admits he did not. Trial counsel acknowledged under oath that with the denial of a continuance he simply "ran out of time" to properly investigate mitigation. In addition, we have the sworn and unrebutted testimony of co-counsel who says the situation was so bad that he threatened to go to the trial judge and disclose the blatant lack of investigation and preparation. He concedes that he made a serious mistake in not doing so.

In the post-conviction hearing below the appellant presented a vast array of mitigating circumstances of the most serious nature that should have been thoroughly investigated and presented at the original penalty phase. Two brief excerpts from appellant's brief provide a flavor of the information that would have been discovered had a proper investigation of appellant's life been done:

> Billy was sent to youth hall for the first time at age 12. Shortly after he arrived there, he was raped. Two years later, he was sent to the Florida School for Boys at Okeechobee. At Okeechobee, Billy was hog tied, drenched in water and left over night in the "wet room,"

and frequently sent to the "ice cream room," where he was given thirty licks with straps and paddles, the process being repeated if he cried out during the beating. T. 486, 498; App. 32. He also saw other children be sexually abused, and was placed under the supervision of older and larger offenders. T. 205-09. The substandard conditions at Okeechobee are well documented, *see generally* App. 37, and were described in detail by juvenile justice expert Paul DeMuro. DeMuro described the dangerous, overcrowded conditions in the dormitories, where status offenders were not separated from violent offenders, nor smaller children from larger, leading to frequent physical and sexual assaults on the younger and smaller children; the absence of any attempt to treat or rehabilitate youthful offenders; and the fact that small, middle class white boys without a history of institutionalization (like Billy Van Poyck when he was first sent to Okeechobee) were at the greatest risk. T. 319-32.

....

Approximately two years after Billy was sent to adult prison, he suffered a breakdown. For most of the next several years he received psychiatric treatment and medication, including "industrial strength" dosages of antipsychotic medications, and two admissions to the Florida State Hospital in Chattahoochee. T. 595-605; *see generally* Def. Exs. 23, 24. Dr. Rothenberg believes that this breakdown was the predictable result of the failure to provide the type of long term inpatient treatment he had recommended for Billy:

This subsequent history confirms my initial diagnosis. It is predictable and almost inevitable that a young and vulnerable person, already suffering from psychosis, would deteriorate further when placed in an adult prison, without any therapeutic intervention. In the absence of the type of therapeutic intervention that I recommended, there is no reason to believe that Mr.

> Van Poyck's mental illness has ever dissipated. While the observability of such a mental illness fluctuates over time and may be masked by medication, the mental illness itself persists.

App. 46.

> All of this mitigating evidence was readily available to trial counsel, but none of it was discovered or presented. The reasons for these failures are not far to seek. Mr. Van Poyck's lead attorney was Cary Klein. Klein was a general litigation attorney who had never before handled a capital case. T. 1041-42. From the beginning of this difficult, complex case Klein believed a felony murder conviction likely, and that the case would almost certainly go to a penalty phase proceeding. T. 1145. Also, at the very outset of the case Klein *discussed* potential mitigation with Mr. Van Poyck. T. 1060-61. However, Klein did not *investigate* for mitigation at any time prior to the trial. Instead, he had decided to wait until the guilt phase of the trial was over to begin penalty investigation because he believed that the trial court would give a one to three week continuance between phases. T. 1158. He explained at the hearing that he was counting on this time to "investigate" penalty phase issues and felt safe in doing so because the court had "assured" him that there would be a few weeks between phases. *Id.* As it turned out, no continuance was forthcoming, and the record contains no written or oral order or promise of a continuance. *See* T. 1196.

Appellant's Initial Brief at 15, 17-18.

In our previous review of this case we found insufficient evidence of premeditation but affirmed appellant's guilt on a felony-murder theory. In our opinion we upheld the sentence of death and expressly noted that the trial court properly rejected

the meager mitigation offered by counsel. *Van Poyck v. State,* 564 So.2d 1066 (Fla.1990). Knowing what we do now, we should not give our approval to a sentence of death predicated upon a patent case of ineffective assistance of counsel. In doing so we are simply providing additional support to the already considerable body of evidence that the death penalty process is seriously flawed by the legal system's tolerance of incompetent counsel. *Cf.* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer,* 103 Yale L.J. 1835 (1994). Van Poyck is not going anywhere; he has been convicted and imprisoned for first degree murder. His conviction and imprisonment are not in question. We should apply our holding in *Deaton v. Dugger* and remand this case for a reliable penalty phase proceeding in which evidence of aggravation and mitigation can be presented by counsel prepared on *both* sides.

KOGAN, C.J. and SHAW, J., concur.

694 So.2d 686, 22 Fla. L. Weekly S161

APPENDIX E

SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK,
Appellant,

v. No. 73,662

STATE OF FLORIDA,
Appellee.

[July 5, 1990]
Rehearing Denied Sept. 4, 1990

PER CURIAM:

William Van Poyck appeals his convictions for first-degree murder, attempted first-degree murder, aiding in an attempted escape, aggravated assault, and six counts of attempted manslaughter and his sentence of death imposed for the first-degree murder conviction. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm Van Poyck's convictions and sentences.

The record establishes that on June 24, 1987, corrections officers Steven Turner and Fred Griffis transported James O'Brien, a state prison inmate, in a van from Glades Correctional Institute to a dermatologist's office for an examination. Griffis, who was not armed, drove the van while Turner watched O'Brien, who was secured in a caged area behind Griffis. After Griffis pulled the van into an alley behind the doctor's office, Turner looked down for his paperwork. Upon looking up, he saw a person, whom he later identified as Van Poyck, aiming a pistol at his head. Van Poyck ordered Turner to exit the van. At the same time, Frank Valdez, an accomplice of Van Poyck's, went to the driver's side of the van.

Turner testified that Van Poyck took his gun, ordered him to get under the van, and kicked him while he was attempting to comply with Van Poyck's order. He testified that, while under the van, he saw Griffis exit the van; he noticed another person forcing Griffis to the back of the van; and, while noticing two sets of feet in close proximity to the rear of the van, he heard a series of shots and saw Griffis fall to the ground. Turner further stated that Van Poyck had stopped kicking him when the gunfire started, but noted that he did not know where Van Poyck was at the time of the shooting. Griffis was shot three times, once in the head and twice in the chest. Expert testimony indicated that the shot to the head was fired with the barrel of the gun placed against Griffis' head and that each of the wounds would have been fatal. It was also determined that the murder weapon was a Hungarian Interarms nine millimeter semiautomatic pistol.

After Griffis was shot, Turner was forced to get up from under the van and look for the keys. Upon realizing that Turner did not have them, Valdez fired numerous shots at a padlock on the van in an attempt to free O'Brien. One of the shots ricocheted off of the van and struck Turner, causing him minor injuries. Turner testified that at around this time Van Poyck aimed the Hungarian Interarms semiautomatic nine millimeter pistol at him and pulled the trigger. Although no bullet was fired, Turner stated that he heard the gun click. Turner then fled the scene when Van Poyck turned his attention to Valdez, who was smashing one of the windows on the van. After Van Poyck noticed that two cars had just driven into the alley, he and Valdez approached the cars and Van Poyck shattered the windshield of one of the cars with the butt of a gun. Van Poyck and Valdez then ran to a Cadillac parked in an adjacent parking lot and departed from the scene. A police officer, who arrived at the scene and witnessed the two men leaving, radioed for help and a chase followed. During the chase, Van Poyck leaned out of the car window and fired numerous shots at the police cars in pursuit, hitting three of them.

Valdez eventually lost control of the Cadillac and the car crashed into a tree. Van Poyck and Valdez were immediately taken into custody and four pistols were recovered from the car: a Hungarian Interarms nine millimeter semiautomatic pistol, a Sig Sauer nine millimeter semiautomatic pistol, a Starr .22 caliber semiautomatic pistol, and Turner's Smith and Wesson .38 caliber service revolver.

Van Poyck, testifying in his own behalf, denied that he shot Griffis and stated that, while kicking Turner, he heard the gunshots and saw Griffis fall to the ground. He did, however, acknowledge that he planned the operation and recruited Valdez to assist him in his plan. Additionally, he stated that they took three guns with them.

The jury found Van Poyck guilty of first-degree murder, six counts of attempted manslaughter, armed robbery with a firearm, aggravated assault, and aiding in an attempted escape. With regard to the first-degree murder charge, the jury was given a special verdict form which contained blanks for "premeditated murder," "felony murder," and "both." The jury returned the verdict form with "felony murder" and "both" checked and "premeditated murder" left blank.

In the penalty phase, the state presented Van Poyck's parole officer who testified that Van Poyck was on parole at the time of the incident and that he had three previous convictions, two for robbery and one for burglary. Other witnesses for the state included victims of these offenses. Van Poyck presented five witnesses in mitigation, including himself. A nurse from the Palm Beach County jail stated that he helped other inmates in various ways. His brother, who was also in prison, testified about their home life, explaining that their father was frequently away from home on business and their mother had passed away when Van Poyck was young. Van Poyck's aunt testified that for a period of time the family lived with a housekeeper, who appeared to be strange and unstable. Van Poyck's stepmother testified about his family situation, noting that his brother and

sister had juvenile records. She also indicated that Van Poyck felt remorse for his actions. Finally, Van Poyck testified in his own behalf, taking responsibility for the fact that Griffis was killed and expressing remorse for his actions.

By an eleven-to-one vote, the jury recommended the death sentence for the first-degree murder conviction. The trial judge imposed the death sentence and found the following four aggravating circumstances: (1) that the crime was committed while Van Poyck was under a sentence of imprisonment in that he was on parole when he committed the act; (2) that the crime was committed for the purpose of effecting an escape from custody; (3) that Van Poyck knowingly created a great risk of death to many persons; and (4) that Van Poyck was previously convicted of another felony involving the use or threat of violence to some person. In finding insufficient mitigating evidence to override the above aggravating factors, the trial judge stated in his order:

> The defendant presented evidence which attempted to show that he was under the influence of another person, to wit: his brother and/or Mr. O'Brien. This court finds that the evidence was totally lacking to establish in any way that mitigating factor based upon the fact that he clearly had had no contact with his brother for numerous years other than by infrequent letter- writing and that he had in fact not seen Mr. O'Brien for a long period of time. Further, the defendant admitted on the stand that he was operating during the commission of this offense as a person responsible for his own acts and with knowledge of what he was doing.

The judge also rejected evidence of a difficult childhood:

> The only other potential mitigating circumstances for which evidence was presented was that ... Van Poyck's mother died when he was approximately eighteen (18) months of age. However, it was shown that he was

subsequently raised in a good family and by people that cared for him. Further, the court would note that Mr. Van Poyck is an individual who is quite intelligent and very knowledgeable as to the law and that he himself admits that he was well aware of the law including felony murder, that he himself was the individual who planned this operation.

The trial court also imposed upon Van Poyck six fifteen-year sentences for the six counts of attempted manslaughter, five years with a mandatory minimum of three for aggravated assault, fifteen years for aiding in an attempted escape, and life imprisonment for attempted first-degree murder. The trial judge stated that each of the above sentences should run consecutively.

Guilt Phase

Van Poyck raises the following six issues in the guilt phase of this appeal: (1) the trial court erred in not severing the multiple offenses in this case; (2) the evidence was insufficient to support a conviction for first-degree premeditated murder; (3) the evidence was insufficient to support a conviction for attempted first-degree murder; (4) the evidence was insufficient to support a conviction for aiding in an attempted escape; (5) the evidence was insufficient to support the convictions of six counts of attempted manslaughter; and (6) the convictions in issue (5) violated the rule of lenity.

With reference to the first claim regarding severance, all of the crimes arose out of a single criminal episode, which began with the unsuccessful attempt to free a prisoner and concluded in a police chase. We find that the trial court's denial of Van Poyck's motion to sever was consistent with Florida Rules of Criminal Procedure 3.150(a) and 3.152(a). *Bundy v. State,* 455 So.2d 330 (Fla.1984), *cert. denied,* 476 U.S. 1109, 106 S.Ct. 1958, 90 L.Ed.2d 366 (1986); *Spivey v. State,* 533 So.2d 306 (Fla. 1st DCA 1988).

With regard to point two, we agree with Van Poyck that the evidence is insufficient to establish first-degree *premeditated* murder. The state's evidence was conflicting as to where Van Poyck was at the time of the killing. We note that the trial judge, in his sentencing order, was not sure of Van Poyck's whereabouts: "Van Poyck *may* have in fact been the individual who pulled the trigger and shot Fred Griffis." (Emphasis added.) Although the evidence was insufficient to establish first-degree premeditated murder, we find that the evidence was clearly sufficient to convict him of first-degree felony murder. While this finding does not affect Van Poyck's guilt, it is a factor that should be considered in determining the appropriate sentence.

The remaining issues concerning the sufficiency of the evidence and the violation of the rule of lenity are without merit. The evidence in this record clearly sustains those convictions.

Penalty Phase

Van Poyck raises fifteen issues in the penalty phase: (1) the trial court failed to properly consider the mitigating evidence; (2) the aggravating circumstance of knowingly creating a great risk of death to many persons is vague, overbroad, and capricious; (3) the trial court erroneously found the aggravating circumstance of knowingly creating a great risk to many persons; (4) the trial court erred in denying Van Poyck's request for limiting jury instructions on the aggravating circumstance of knowingly creating a great risk of death to many persons; (5) the trial court failed to direct the jury to make a mandatory factual determination concerning Van Poyck's participation as prescribed by the United States Supreme Court's decisions in *Tison v. Arizona,* 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), and *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); (6) the trial court failed to make the required factual findings required by *Tison*

and *Enmund* in its sentencing order; (7) the trial court violated Van Poyck's right to a fair trial by refusing to excuse pro-death jurors and attempting to exclude jurors opposed to the death penalty; (8) Florida's death penalty statute is unconstitutional as applied to this case; (9) the trial court gave Van Poyck insufficient time to obtain adequate medical examinations; (10) the trial court erred with regard to sequestering the jury; (11) the trial court improperly considered Van Poyck's prior convictions; (12) the trial court erred in finding the existence of an aggravating circumstance which duplicated an essential element of felony murder; (13) Van Poyck was denied his right to effective assistance of counsel during the penalty phase of the trial; (14) the death sentence is not proportional under these facts; and (15) Florida's death penalty statute is unconstitutional. After fully considering these issues in light of the record in this cause, we find no error which requires a new sentencing proceeding.

We find no merit in Van Poyck's claims that he was a minor actor and did not have the culpable mental state to kill. In *DuBoise v. State,* 520 So.2d 260 (Fla.1988), we reiterated the established principle in Florida that the death penalty is appropriate even when the defendant is not the triggerman[30] and discussed proportionate punishment, stating:

> In *Tison* the Court stated that *Enmund* covered two types of cases that occur at opposite ends of the felony-murder spectrum, i.e., "the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state" and "the felony murderer who actually killed, attempted to kill, or intended to kill." The Tison brothers, however, presented "the intermediate case of the defendant whose participation is major and whose

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[30] *See, e.g., Copeland v. Wainwright,* 505 So.2d 425 (Fla.), *vacated on other grounds,* 484 U.S. 807, 108 S.Ct. 55, 98 L.Ed.2d 19 (1987); *Jackson v. State,* 502 So.2d 409 (Fla.1986), *cert. denied,* 482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed.2d 686 (1987).

> mental state is one of reckless indifference to the value of human life." The Court recognized that the majority of American jurisdictions which provide for capital punishment "specifically authorize the death penalty in a felony-murder case where, though the defendant's mental state fell short of intent to kill, the defendant was the major actor in a felony in which he knew death was highly likely to occur," and that "substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an 'intent to kill.' " Commenting that focusing narrowly on the question of intent to kill is an unsatisfactory method of determining culpability, the Court held "that *major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement.*"

Id. at 265-66 (citations omitted, emphasis added) (quoting *Tison v. Arizona,* 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987)). Although the record does not establish that Van Poyck was the triggerman, it does establish that he was the instigator and the primary participant in this crime. He and Valdez arrived at the scene "armed to the teeth." Since there is no question that Van Poyck played the major role in this felony murder and that he knew lethal force could be used, we find that the death sentence is proportional.

We note that, although the pro-death jurors should have been excused for cause, the trial judge subsequently excused them for personal reasons. Consequently, Van Poyck was not required to exercise any peremptory challenges with regard to those jurors and that issue is moot.

We find that none of the other claims merit discussion. Further, we conclude that each of the aggravating circumstances found by the trial judge was properly established in this record and that the trial judge could properly conclude that the

aggravating circumstances outweighed the mitigating evidence in this cause. Accordingly, we affirm each of Van Poyck's convictions and sentences.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, EHRLICH, BARKETT, GRIMES and KOGAN, JJ., concur.

564 So.2d 1066, 15 Fla. L. Weekly S379

APPENDIX F

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR PALM BEACH COUNTY.

CRIMINAL DIVISION "V"

CASE NO.: 87-0736-CF A02
88-11116-CF A02

STATE OF FLORIDA

VS.

WILLIAM VAN POYCK,

Defendant.

ORDER

THIS MATTER is before the Court for Sentencing. The Court notes that the order will contain sentencing for each court and that the sentencing order will state the counts in the same order of the verdict form, not the order of the indictment.

COURT I: The jury having found the Defendant, WILLIAM VAN POYCK guilty of First Degree Murder and having by a vote of eleven to one made a recommendation of death it is the judgment and sentence of the Court that WILLIAM VAN POYCK be sentenced to death for the murder of FRED GRIFFIS. Said sentence is to be carried out in accordance with the laws of the State of Florida.

The Court finds as aggravating circumstances the following:

1. The crime for which WILLIAM VAN POYCK is sentenced to death was committed while he was under a sentence of imprisonment in that he was on parole at the time of commission of this act.

2. The crime for which the Defendant is sentenced was committed for purpose of effecting an escape from custody and in this case to effect the escape of Mr. O'Brien.

3. The Defendant in the commission of this crime for which he is sentenced knowingly created a great risk of death to many persons; this includes the people at the scene of the murder to wit: Officer Steven Turner, Mr. Ruble and Mr. Zimmerman who work at Good Samaritan Hospital and upon hearing the shots went to check the matter out and saw Mr. Van Poyck point a firearm at them. After the incident a bullet hole was found in the nurses' residence next to the doctor's office where the murder occurred, in the direction and area Mr. Van Poyck had pointed the firearm at Mr. Ruble and Zimmerman. Further, Mr. & Mrs. Brown in the Cadillac that pulled up into the alley as the events occurred; the individuals in the doctor's office including but not limited to: Mrs. Oriole, Dr. Rosenberg, and Lisa Bancraft, who were looking out the windows and door, along with another witness, Heff who was standing in the alley watching all the events.

This Court believes that the chase that took place in Mr. Van Poyck and Mr. Valdes' attempt to escape from the scene where numerous police cars were fired at, approximately twenty shots total, on two of the busiest streets in Palm Beach County, (Palm Beach Lakes Blvd. & Australian Blvd.) Is a part of this aggravating factor of knowingly creating a great risk of death to many persons, (see the convictions for counts 0 through 11).

4. The Defendant, WILLIAM VAN POYCK having previously been convicted of another capitol offense or felony involving the use of threat or violence to some person, in this case the prior conviction of the offense of robbery, which involved a shooting and chase.

Further this Court does not find that any mitigating factors exist or have been shown to exist. The defendant presented evidence which attempted to show that he was under the influence of another person to wit; his brother and or Mr. O'Brien. This Court finds that the evidence was totally lacking to establish in any way that mitigating factor based upon the fact that he clearly had had no contact with his brother for numerous years other than by infrequent letter writing and that he had in fact not seen Mr. O'Brien for a long period of time. Further the Defendant admitted on the stand that he was operating during the commission of this offense as a person responsible for his own acts and with knowledge of what he was doing.

The only other potential mitigating circumstance for which evidence was presented was that the Defendant, WILLIAM VAN POYCK's mother died when he was approximately eighteen (18) months of age. However it was shown that he was subsequently raised in a good family and by people that cared for him. Further the Court would note that Mr. Van Poyck is an individual who is quite intelligent and very knowledgeable as to the law and that he himself admits that he was well aware of the law including felony murder, that he himself was the individual who planned this operation who retained Mr. Valdes to assist him and who checked the guns on the way to the location where the murder occurred to see to it that they were loaded. By all evidence Mr. Van Poyck was a major participate in this murder.

The Court further finds that the State clearly presented competent and substantial evidence as to the crime of first degree felony murder and or first degree pre-mediated murder and in reality presented competent evidence that Mr. Van Poyck may have in fact been the individual who pulled the trigger and shot Fred Griffis.

COUNT II: This Court for the sentence of armed robbery with a firearm sentences the Defendant, WILLIAM

VAN POYCK to a term of LIFE in the State Department of Corrections with a three year mandatory minimum sentence to run consecutive with any sentence prior imposed.

COUNT VI: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the offense of attempted manslaughter, to run consecutive with any sentence prior imposed.

COUNT VII: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the offense or attempted manslaughter, to run consecutive with any sentence prior imposed.

COUNT VIII: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the conviction of the charge of attempted manslaughter, said sentence to run consecutive to any sentence prior imposed.

COUNT IX: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the offense of attempted manslaughter, this sentence to run consecutive to any prior imposed.

COUNT X: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the conviction of attempted manslaughter, said sentence to run consecutive to any prior imposed.

COUNT XI: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the conviction of attempted manslaughter, said sentence to run consecutive to any prior imposed.

COUNT XII. This Court sentences the Defendant, WILLIAM VAN POYCK to 5 years with a minimum mandatory sentence of 3 (three) years for the conviction of aggravated assault said sentence shall run consecutive to any prior imposed.

COUNT XIV. This court sentences Defendant, WILLIAM VAN POYCK to 15 years for the conviction of aiding in the attempted escape said sentence to run consecutive to any prior imposed.

For the conviction contained in information 88-11116-CF A02 this Court on the charge of Attempted First Degree Murder, this court sentences the Defendant to LIFE In prison to run consecutive to any prior imposed, with a 3 year mandatory minimum. This mandatory minimum 3 year sentence shall run concurrent with the mandatory minimum sentence contained in count two.

DATE AND ORDERED this ____ day of _____, 198__, in West Palm Beach, Palm Beach County, Florida.

_____
MICHAEL D. MILLER
CIRCUIT COURT JUDGE

APPENDIX G

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

FIFTH AMENDMENT: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

EIGHTH AMENDMENT: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FOURTEENTH AMENDMENT: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty and property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.